No. 363.

Brf. of Birney, Hemphill & Peter for Appellees.

Supreme Court, U. S.
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vs.

J. FORREST MANNING AND HARRY E. RUPPRECHT, TRADING AS J. F. MANNING & CO.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, sustaining a bill in equity which seeks to compel the appellant company to observe the act of Congress approved June 30, 1898, fixing the rates for telephone service in the District of Columbia; the prayer of the bill being, in substance, that the telephone company be enjoined from removing the telephone equipment in the office of the complainants, and from refusing them telephone service so long as they shall pay rental at the rate fixed by the statute (Rec., p. 5).

The provision of law in question is a part of the act making appropriations for the District of Columbia for the year ending June 30, 1899, and reads as follows:

> "TELEGRAPH AND TELEPHONE SERVICE.—For general supplies, repairs, new batteries and battery supplies, telephone rental and purchase . . . and other necessary items, eleven thousand, five hundred dollars. *Provided*, that from and after the passage

of this act it shall be unlawful for any person or any telephone company doing business in the District of Columbia, to charge or receive more than fifty dollars per annum for the use of a telephone on a separate wire; forty dollars for each telephone, there not being more than two on a wire; thirty dollars for each telephone, there being not more than three on a wire, and twenty-five dollars for each telephone, there being four or more on the same wire."

30 *Stat. at Large*, 537, 538.

Prior to the passage of this statute the complainants, merchants in the City of Washington, had entered into a contract (Rec., p. 10) with the defendant for telephone service at their premises, corner of H and Fourteenth streets, for which they agreed to pay $145 per annum in quarterly payments, with right of discount of $2.50 per quarter for payments in advance, "until this agreement is terminated by ten days' notice in writing given by either party to the other" (Rec., p. 13), which last provision is common to all defendant's contracts.

On July 2, 1898, after the enactment of the quoted statute, appellants gave ten days' notice of desire to terminate the contract (Rec., p. 14), and, on July 12, gave notice they would retain the telephone at the rate fixed by Congress, and remitted $12.50 as pay in advance for the first quarter-year (Rec., p. 14). The appellee returned the money with the statement that it could not furnish telephone service at the rates named in the act referred to, "for the reason, amongst others, that these rates are less than the actual cost to the Company" (Rec., p. 15).

July 14, complainants filed their bill for injunction against the removal of the telephone and appliances and discontinuance of the service. After the coming in of the answer an injunction *pendente lite* was ordered, upon condition of continued payment each quarter at the statute rate (Rec., pp. 15, 16).

Before November 17, 1898, fifty other suits of similar character had been filed, and they were consolidated with this for purposes of proofs and hearings (Rec., p. 16).

In some twenty-six of these suits the complainants had not given the ten days' notice of termination of contract; a list is given at page 434 of the Record. This fact is the only substantial fact distinguishing the cases.

The answers of the defendant in the several cases are substantially alike, the defenses set up being:

(*a*) The statute, if valid, has no application to any individual desiring telephone service, but applies only to such service as may be rendered for the public to the District of Columbia, for the fire alarm, police and other public purposes.

(*b*) That the act of Congress is unconstitutional and void, because the maximum rates allowed by it are below the cost of furnishing the service; that it is not within the power of Congress—

> "to compel the defendant to furnish to the complainants telephone service at less than its cost to the defendant to furnish the same, and avers that if service is required to be furnished at such rates, it will be destructive of the defendant's business, a practical confiscation of its property, and a deprivation of its property and property rights without just compensation or due process of law" (Rec., pp. 8, 9).

The justice holding the special term in equity of the Supreme Court of the District of Columbia, dismissed the bill. The Court of Appeals reversed this decree, held the statute valid, and decreed an injunction (Rec., pp. 1171–1181).

QUESTIONS IN ISSUE.

The objection that the statute applied only to rates for service to the District of Columbia for the fire-alarm, police and other public telephones was not pressed in either of the courts below.

The questions discussed in the Court of Appeals and fairly open to discussion here are:

First. Does the validity of the statutory provision in question depend upon the sufficiency of the rates fixed thereby to yield the telephone company a fair return upon its investment?

Second. Does it appear, upon all the evidence, beyond a reasonable doubt, that the rates fixed are so low that if enforced they will be destructive of the property rights of the company?

If the first question be determined in the negative, it is clear that no discussion of the testimony tending to answer the second will be necessary.

ARGUMENT FOR COMPLAINANTS.

I.

The Plenary Power of Congress to Legislate upon Public Subjects in the District of Columbia is not Limited by the Fact that the Exercise of that Power May Injuriously Affect Private Interests.

> "The rule of law appears to be that except when the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not, in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicia cognizance."
>
> Cooley's Const. Lim. (6th Ed.) pp. 200, 201.

The statement of the rule made by this court in *McCullough* v. *Maryland*, and grown since to be axiomatic, is directly applicable:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

McCullough *vs.* Maryland, 4 Wheat. 421.
The Legal Tender Cases, 12 Wall. 539.

The exclusive right to legislate for the District of Columbia is in Congress; the exercise of that power in regulating rates to be charged by public service corporations is legitimate, and the means adopted are plainly adapted to that end.

Provisions of Constitution Supposed by Appellant to be Invalid.

We have not had the benefit of a brief for appellant in this court, but in the Court of Appeals it was urged that the statute is opposed to the provisions of the Fifth Amendment and to section 1 of the Fourteenth Amendment to the Constitution. Since the property provision of the Fourteenth Amendment is a limitation only on the powers of the States, it has no application to this cause.

Is then this legislation bad in view of the provision of the Fifth Amendment that private property shall not "*be taken for public use without just compensation*"?

The answer is found in the decisions of this court that this provision of the Constitution "refers solely to the exercise, by the State, of the right of eminent domain."

Gilman *vs.* Sheboygan, 2 Black, 510, 513.

There is no "taking" under this statute, within the meaning of that term in the Amendment, for there is neither a conversion of property or an encroachment upon it, but only an impairment of the value of the use of property which remains in the possession and ownership of the appellant.

"Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the Constitutional provision which forbids the taking of such property for public use without just compensation."

Transportation Co. *vs.* Chicago, 99 U. S. 635.
Cooley's Const. Lim. (6th Ed.), 666 and notes.

"Appropriate regulation of the use of property is not 'taking' property within the meaning of the Constitutional prohibition."

Railroad Co. *vs.* Richmond, 96 U. S. 521, 529.

In those cases where this court has held statutes fixing rates to be void, because the rates were unreasonably low, the unconstitutionality was found in the prohibition of the Fourteenth Amendment, not the Fifth.

Dow *vs.* Beidelman, 125 U. S. 680.
Chicago, etc., *vs.* Minnesota, 134 U. S. 418, 458.
Chicago, etc., *vs.* Wellman, 143 U. S. 339.
St. Louis, etc., *vs.* Gill, 156 Id. 649.
Smyth *vs.* Ames, 169 U. S. 526.

If, then, the Fourteenth Amendment is not applicable to legislation by Congress, and the Fifth Amendment is applicable only to the exercise of the right of eminent domain, or *direct encroachment* on property so as to disturb the possession thereof, no *language* of the Constitution prohibits this legislation, and the appellant must take the position that only because it has established its business, an act of general legislation, which, if enforced, would injure or destroy that business, is beyond the power of Congress.

The Appellant a Public Service Corporation.

That telephone companies are subject to legislative con-

trol as public service corporations is not denied by the answer, and is not open to question.

Hockett *vs.* State, 105 Ind. 250.
Central U. Tel. Co. v. *Bradbury, 106 Ind. 1.*
Same v. *State, 118 Ind. 194.*
State v. *Bell Tel. Co., 36 Ohio St. 296.*
Ches. & Potomac Tel. Co. v. *B. & O. Tel. Co., 66 Md. 399.*
State v. *Nebraska Tel. Co., 8 Am. & Eng. Corp. Cas. 1.*

The property of the defendant being affected with a public use—

> "the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains."
>
> Georgia RR. Co. *vs.* Smith, 128 U. S. 174.

As was said in the earliest of the cases on this subject, the defendant established its business—

> "subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. . . . If they did not wish to submit themselves to such interference they should not have clothed the public with an interest in their concerns."
>
> Munn *vs.* Illinois, 94 U. S., p. 133.

Appellant a Foreign Corporation.

The Chesapeake and Potomac Telephone Company is a New York corporation. It is not chartered by Congress, nor has Congress done more than suffer it to do business in the District of Columbia. In the opinion of the Court of Appeals (Rec., p. 1173) are found all the acts of Congress in any way referring to this company. The only recognition the company claims, is found in clauses of two appropriation bills to pay it small sums for services rendered, (30 Stat. 117, 126), and in clauses of other bills providing for

the regulation of wires and poles of any existing telegraph, telephone or electric light company. The defendant is not named in these provisions, and in each case Congress reserved the right to repeal at will and without compensation.

Appellant has No Charter Rights in the District of Columbia.

The right of the appellant to do business in the District of Columbia depends solely on the will of Congress.

Bank of Augusta *vs.* Earle, 13 Pet. 589.
Hooper *vs.* Cal., 155 U. S. 648, 652.
Paul *vs.* Virginia, 8 Wall. 168.
Waters-Pierce Oil Co. *vs.* Texas, 177 U. S. 28.

As was said in Hooper *vs.* California:

> "The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States" (p. 656).

Had Congress chartered this company, and reserved (as in the cases of street railway, gas and electric light companies) the right of repeal of such charter, there could be no doubt of its right to terminate all powers of the company; compel it to remove its conduits, cables, wires and poles from the public ways, and thereby destroy its business and convert its corporeal property into old junk. Because the company has no contract, but only a bare permission to pursue its business, does it stand in better position to deny to Congress the power of control? Is the reserve power which Congress would have had it *authorized* the company's operations, non-existent because it has permitted them?

Would not Congress now have the legal right by direct legislation to exclude this foreign corporation from doing business in this District? If yes, then even though the untrue contention that this act of general legislation will indirectly effect the same result, be established, how may it be claimed that the statute is void?

There being no contract by charter the appellant must be held to have—

> "invested its capital relying upon the good faith of the people, and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."
>
> Chicago RR. Co. *vs.* Iowa, 94 U. S. 155, 162.
> Munn *vs.* Illinois, 94 U. S. 126, 133.

No Impairment of Contracts.

It was contended for the company in the courts below that the legislation in question impairs the obligation of contracts between the telephone company and its subscribers (the contract rates being in excess of the statute rates), and is therefore void. That is to say, because a public service corporation has been sufficiently astute to make contracts for a term of years, until that term shall pass the hands of Congress are tied, and its power to pass public laws upon the subject is gone. To state the proposition is to condemn it.

The precise question was passed upon by the Court of Appeals of Maryland in a case to which this appellant was a party (*Ches. & Pot. Tel. Co.* v. *B. & O. Telegraph Co., 66 Md. 399*), where to a petition for mandamus to compel telephone service, one of the defenses was, that by contract with the Western Union Telegraph Company, the defendant had bound itself not to furnish telephone service to any other transmitter of news. The court held the contract ineffective to bar the public right to demand service of a public service corporation.

That in contracts between appellant and its subscribers both parties must be held to have contracted subject to the right of Congress in the exercise of its powers of general legislation, to modify or even annul those contracts, is settled by decisions of this court.

> Mumma *vs.* Potomac Co., 8 Pet. 281, 287.
> Chicago Life Ins. Co. *vs.* Needles, 113 U. S. 574, 584.

In one of the Granger cases, it was held not to affect the validity of the act regulating rates, that before the statute the company had pledged its income to secure debts, and had leased its road to a tenant that relied upon the earnings to pay the stipulated rent. The pledgee and the tenant were held to have taken the property subject to the exercise by the State of its powers of regulation.

> Chicago RR. Co. *vs.* Iowa, 94 U. S. 155.

In State ex rel., etc., *vs.* Bell Tel. Co., 8 Am. and Eng. Corp. Cas., 7, Mr. Justice Brewer said of the effect of Munn *vs.* Illinois:

> "Whenever the property is put into those (public) channels, it is put within the power of the public, speaking through its legislature, or the power of the court enunciating general rules operative upon such transactions, to *modify leases, modify contracts,* control duties," etc. (p. 8).

There is then no contract in question which Congress could not lawfully modify. It may be urged, as in the courts below, that it appears in the record that some of the Government departments had contracted with appellant to pay for telephone service, rates greater than allowed by the act, and that because the statute will reduce the rate fixed by these contracts, it was beyond the power of Congress to pass it. There are many answers to this contention. We content ourselves with suggesting: *First,* it will be time enough to discuss the effect of this statute on contracts between the

telephone company and the United States when one of those contracts shall be before the court; *second*, the executive officers of the Government are not Congress, and can not, by any contract they may make, deprive Congress of its right to legislate upon a public subject; and, *third*, there is no constitutional inhibition upon the impairment of contracts by Congress.

> McCullough *vs.* Maryland, 4 Wheat. 405.
> Legal Tender Cases, 12 Wall. 457, 501, 523, 539, 547.
> Mitchell *vs.* Clark, 110 U. S. 643.

Congress was not Bound to Confer with Appellant or Grant a Hearing before Exercising its Power of Legislation.

The appellant strenuously contended in the Court of Appeals that the provision in question is void because it appears (Rec., p. 104) that before the passage of the act in the House of Representatives, February 2, 1898, no investigation was had by either House into telephone rates, no examination was made in the Senate before the provision passed that body, March 8, 1898, and that under the rules of the House of Representatives the conference committee had no power to act upon any provision of a bill which had passed both Houses, and therefore could make no use of the information obtained in the uncompleted investigation undertaken by a committee of the House of Representatives. Further, it was contended that the appellant had the right to be heard before the legislation was enacted, and that failure to give it notice of intended action, renders the enactment void.

The Court of Appeals declared this argument irrelevant, and said—

> "that the power of regulation is not dependent upon notice and hearing, and we are bound to presume that Congress acted with due knowledge and fair consideration of all the facts and circumstances

of the situation which it undertook to affect" (Rec., p. 1174).

This must be so. To hold otherwise would be to paralyze legislation. Is a statute fixing prohibitive duties upon imports of certain kinds, to be held void on complaint of an importer that Congress passed the act without first giving him notice and an opportunity to harangue its committees? Again, if courts shall listen to the argument that Congress had no information on the subject of its legislation, why should they not pass on the question whether Congress having information, that information was sufficient, or accurate, or truthful, and thus investigate Congress and revise its work?

Appellant a Tenant by Sufferance.

Appellant of necessity occupies for its business the public streets of the city, the fee in which is in the United States as owners. The appellant has had at most a revocable license to occupy this public property. Congress may impose what terms it pleases, reasonable or unreasonable, upon its further use of this property. This is the indirect effect of the legislation in question.

II.

THE FACTS.

History of Washington Plant.

The first telephone exchange in Washington was established by George C. Maynard and William H. Barnard, in January, 1879, under the name of The National Telephone Exchange. This continued until December 1, the same year, when it was succeeded by the National Capital Telephone Company, a corporation, which, in August, 1883, was succeeded by the Chesapeake and Potomac Telephone

Company, the defendant to this suit (Rec., pp. 32–3). The assets conveyed to the present company were (Rec., p. 71):

Cash	$79,601 79
Accounts receivable	9,128 22
Supplies	3,618 24
Stock National Fair Association	100 00
	$92,448 25
Less accounts payable	15,113 32
Net cash assets	$77,334 93
Cost of actual construction	91,130 21
Total	$168,465 14

For this the company delivered stock to the amount of $750,000 (Rec., p. 32), its total capital stock being $2,650,000.

At the same time the Chesapeake and Potomac Telephone Company acquired all the rights of the Telephone Exchange Company, a West Virginia corporation, then operating in Maryland. The consideration was $1,900,000 of the capital stock of the Chesapeake and Potomac Company. Of this stock $630,000 was delivered to the National Bell Telephone Company, and $1,270,000 to the Telephone Exchange Company. Of this last amount $100,000 was to be passed to trustees for the use of the Chesapeake and Potomac Telephone Company, and subsequently $62,600 thereof was assigned to the National Bell Telephone Company, and the remainder, $37,400, sold on the market for $24,546.67.

The Chesapeake and Potomac Telephone Company received for this issue of $1,900,000, cash, bills receivable and supplies, $77,334.93, and a plant valued at $300,000. Total, $345,045.24.

The difference between the face value of the stock ($750,000) delivered to the National Capital Company and the actual value of the property received ($168,465.14) is

represented solely by the valuation of the franchises of the latter company at $581,534.60.

The difference between the face value of the stock ($1,900,000) delivered to the Telephone Exchange Company and the actual value of the property received therefrom ($345,045.24) is represented solely by the franchises of the latter company, estimated, $1,554,954.76.

The Chesapeake and Potomac Telephone Company, since taking over the property and franchises of the other corporations, has carried on the business in the District of Columbia, throughout Maryland and a small part of West Virginia. In conducting this business it has charged 40 per cent of its general office expenses against the plant operated in the District, where its general office is kept. Since 1891 it has issued and sold $500,000 of 6 per cent bonds, two-fifths of which are also charged against the District plant (Rec., p. 71).

Total Cost of the Washington Plant.

The accounts of cost were stated in this case to September 30, 1898. To that time the company claims construction has cost $541,254.12, as follows:

Amount expended prior to August, 1883 (Rec., p. 71)	$91,130 21
Amount expended by present company to December 31, 1897 (Rec., pp. 69–71)	441,426 55
Amount expended for nine months ending September 30, 1898	8,697 36
	$541,254 12

Of this amount there has been contributed by stockholders, at any time, only such sum, if any, as may have been put into the business by the predecessors of the present company, the amount of which the witnesses for the company fail to remember (Maynard), or do not know.

Those predecessors charged to construction $91,130.21; but as they made large profits, and had paid dividends of 6 per cent on $200,000 from the beginning (Maynard, Rec., p. 411) and accumulated a surplus in four years of $77,234.93, it is fair to assume that a great part of this construction was paid from receipts, or, at least, so much as with the $77,234.93 would equal the cost of the plant. It may safely be said that the telephone users have paid the entire amount of the cost of construction of the plant as it now stands, besides $36,154.39 for real estate (Exhibit G, p. 71), and dividends to stockholders.

PROFITS.

We have no data from which to state all the profits of the company, but the statements submitted by its expert accountants show that the Washington plant, in the seven years beginning January 1, 1891, earned for the surplus account, $248,226.93; for dividends $138,750; for "depreciation" $53,861.28; for the sinking fund required by its mortgages, $40.000, and for interest on bonds, $48,027.30, a total of receipts over outlays, for other purposes, of $528,865.51 (Rec., pp. 71, 371). The cost of duplicating the company's Washington plant as it stood in December, 1898, was estimated by the appellant's witnesses at $428,000 (Rec., Crenshaw, p. 383; Crandall, p. 391).

The claim of the experts, sworn for complainants, is that the plant could be rebuilt for about $110 per telephone station, or $220,000 for a plant to serve 2,000 subscribers (Rec., Ahern, p. 839; Boyce, p. 502).

The admitted profits, then, in seven years, exceed the total investment by stockholders by the amount which $528,865.51 exceeds $168,465.14, or $360,400.37.

Surely these figures were enough to make telephone users think the company's charges extortionate.

This great income has been derived from a rate of charges averaging, according to Mr. Haskin's tables, $106.01 per telephone station.

Outlays Charged to Construction and Maintenance.

When the Chesapeake and Potomac Company became the owner of the telephone plant in Washington, in August, 1883, the actual cost of that plant was $91,230 (Rec., p. 71, Exh. H). The amount charged to construction since that time is stated by Mr. Haskins as $441,426.50 (Rec., pp. 71, 369). Its average annual charge to maintenance during the six years from 1892 to 1897, inclusive, was $53,765. If this be taken as a fair average of the amount charged to maintenance during the fifteen and one-half years prior to December 31, 1898, we have $833,357 charged to this item, which, with construction, $441,426.50, and dividends $323,843, makes a total for these three items only, of $1,598.626, all of which, together with the unknown totals of charges to interest, sinking fund, surplus and depreciation, has been paid by users of the telephone, and all of which has been earned on an investment of $168,465.14, part of which also came from subscribers.

It will be claimed that the company also spent $144,000, the proceeds of $400,000 of bonds sold in 1891, and Mr. Haskins so states in his Exhibit G (Rec., p. 71), but he admits there is nothing on the books of the company to prove that any part of this money was actually spent in Washington (Rec., p. 367), and Mr. Tompkins, the company's other expert, in his report to the Maryland legislature, in 1895, states that these bonds were issued to meet outlays in Baltimore, which exceeded $510,000 (Rec., p. 49).

Character and Extent of the Plant.

The average number of telephones in use for the nine months ended September 30, 1898, was 2,126, of which

some were on "private lines," so-called; some at "local pay stations," and many more at the ordinary "exchange stations" (Exh. C, Rec., p. 348).

The average number of exchange stations for the six years ending January, 1898, was 1,861 (Rec., pp. 165–6). On October 1, 1898, of the exchange station telephones, 41 were in use by the defendant company and 20 were "dead heads."

The construction and equipment are in great part antiquated. Grounded circuit lines and the Blake transmitter have been almost wholly superseded by metallic circuits in modern construction in other cities (see Detroit, Grand Rapids, Fort Wayne, Richmond, Norfolk, Stockholm, Rec., pp. 451, 496, 825, 864, 101), yet of the 1,856 exchange station lines in operation in Washington, December 31, 1897, 1,238 were grounded circuits with Blake transmitter, and only 618 were metallic circuits (Bryan's test. Rec., pp. 285–6). The difference in construction is explained by Mr. Bryan.

Miles of wire, 7,352, of which 1,457 miles are of steel or iron (Rec., p. 112) and the remainder of copper. Poles, 5,027, of which 1,400 are in the city and 3,627 in the county.

The company has 15.1 miles of conduit, averaging 8¾ ducts, or about 132 miles of ducts (Crenshaw, Rec., pp. 109–111).

By the annual report of the company of January 31, 1898 (Rec., pp. 85–6), there were shown to be in these conduits 697,869 feet of duct, of which 234,174 feet were occupied with cables, and 463,695 feet were unoccupied. Of the 4,600 wires in the cables, only 2,600 were in use.

At this rate the cables then in the ducts would have served 3,804 subscriber's lines, and the ducts, if filled with cables, would serve to supply 11,335 subscribers, or more than five times the number at that time.

Value of the Plant.

Since the determination of what are reasonable rates for service may require consideration of the value of the property in use, testimony was taken on this point.

For the telephone company it is testified that the total outlay charged to "construction" is $541,254.12. For the company Mr. Crenshaw (Rec., p. 487), and Mr. Crandall (Rec., p. 502), give their estimates of cost of reconstruction, while for the complainants Mr. Dunbar (Rec., pp. 679, 680), Mr. Ahern (Rec., pp. 836, 839), and Mr. Boyce (Rec., p. 147), give their estimates of cost of building complete, a plant of the capacity to do the work now done by the plant in use here, it being conceded that the conduit system of the Washington plant is greatly in excess of what is necessary to carry 2,200 subscribers' lines. It is to be remembered that the cost of the conduit is about three-fourths of the cost of all outside underground construction (Crenshaw).

The detailed estimates of Crandall and Crenshaw on the one hand and Dunbar on the other are:

	Crandall and Crenshaw.	Dunbar.
Cable	$65,382 91	$42,450 00
Conduit	146,920 96	40,000 00
Aerial construction	119,020 52	41,000 00
Central office	34,052 27	38,000 00
Subscribers' station	58,811 98	44,000 00
	$427,999 79	$205,450 00

Mr. Ahern, an engineer of extended experience, places the cost at $125 per telephone, including contractor's profit, (or $250,000), while Mr. Boyce, engineer for the Citizens' Company, at Grand Rapids, estimates the cost at from $80 to $110 per subscriber's station, or from $160,000 to $220,000 for a 2,000 lines plant.

The actual cost of the Grand Rapids (independent) plant on January 1, 1899, with 2,200 telephones was $169,000.

The average cost was about $67 per telephone station (Ware, Rec., pp. 480, 494).

In Richmond the cost of the first 1,200 stations was at the rate of $75 each; those installed afterwards cost less (Robertson, Rec., p. 865).

The Norfolk plant of 1,600 stations, cost $100 per subscriber's station (Pannill, Rec., p. 939).

The Detroit Telephone Company's plant of 4,936 stations cost about $120 per station (Rec., p. 841).

Mr. Ahern, of Detroit, certainly the engineer with most experience in constructing telephone plants of any witness who testified, declared his willingness to contract to build a plant at Washington according to any reasonable plans and specifications, at $125 per telephone station (Rec., p. 842).

The cost of equipment has been greatly reduced since 1894, at which time the appellant put in its latest switchboard (Rec., p. 504.)

Nothing in Local Conditions to Cause Great Cost.

There is nothing in local conditions to cause more cost for construction than in other cities. It is not found in underground construction, for Mr. Bryan, the president of the appellant company, testifies this costs less than 25c per duct foot, and that per conduit foot the cost and the average depth is about the same here as in other cities, and that the conduits here with manholes cost less than like construction in Cincinnati without the manholes (Rec., p. 157). Mr. Crenshaw also tells us (Rec., p. 189) that the underground construction here is cheaper than in New York, Philadelphia, Brooklyn, Albany and Boston. Both labor and material are cheaper here than in other cities (Rec., p. 182).

If we ask about the poles we find that three-fourths of them are worth only $4.64 set, and all taken together they average about $10 set.

If we look to asphalt as the cause of the trouble we find it testified that the total present value of the outside plant

is $331,000 (Rec., p. 383) and the real cost (Rec., p. 384) 20 per cent additional, making $400,000 in all, and that the total cost for asphalt from 1891 to 1897 was $35,000, which is less than 10 per cent of the total cost of the outside plant, to say nothing of the inside. These six years, ending in 1897, were years of the heaviest construction and reconstruction, and this hardly represents a fair average of the company's experience as to asphalt. In addition to this, one-half of the overhead construction is iron wire, and not copper, which is the more costly of the two. If we take the inside plant, the switchboard here has cost no more than similar switchboards of the Bell companies of like size in other cities, and to purchase instruments and other equipment for Washington would cost no more than for any other city.

Royalties and Cost of Telephones.

The appellant does not own the telephones it installs, but under its 1883 contracts with the American Bell Telephone Company, pays that company a yearly rental of $7.50 for each receiver and transmitter, and a royalty of $1 for each switchboard drop in use. In 1897 this rental and royalty amounted to $15,578.62. It can not be imagined that except for the ownership of three-fifths of the stock of this company by the American Bell Telephone Company any part of this would have been paid, for no other company about whose affairs testimony has been taken pays royalty. All buy their telephones and switchboards outright. This is equally true of the Canadian company (McFarlane), and the companies operating in Great Britain and in Continental Europe, as of all the "independent" companies of this country.

The cost to the defendant for what it buys for each subscriber's instrument is about $9, and it pays $7.50 yearly rental for the transmitter and receiver.

At Grand Rapids the entire cost of the long distance equipment, including transmitter and receiver, magnets,

batteries and backboards, is $9.90 (Ware, Rec., p. 501). No royalties are paid (Rec., p. 498). The cost of switchboard was $3.50 per drop (Rec., p. 493), and no royalties are paid.

In Canada the cost of the subscriber's equipment with Blake transmitter is given at $12.05, and with the solid back transmitter $22 (McFarlane, Rec., p. 968). The Western Telephone Construction Company sells its long distance subscriber's equipment for $11 and receives no royalty.

It is also in evidence that the entire cost of the Blake transmitter, or grounded circuit instrument, used by the defendant company, is, to the Michigan Telephone Company, a Bell licensee, only $7.07, while each instrument of the long distance type costs about $14 (Boyce, Rec., p. 509).

The instruments in use in Richmond cost $10.50 (Robertson, Rec., p. 798), and the switchboard drops $4 each.

We submit that upon the proofs the value of the defendant's plant in use ought not to be calculated at more than $125 per telephone station, or about $262,000, and that it may not fairly ask returns on more than that sum. And further, that in determining cost of maintenance the company should not be allowed for royalties or rentals.

The truth is that the only item properly entering into the cost of construction which differentiates the plant from that of similar plants in other cities of like size is the average distance per telephone from the central exchange. In this city it is $1\frac{1}{9}$ miles, including the long suburban lines; in other cities it varies from one-fourth to one mile. Nothing can be more easily explained or remedied. Where the rates are low the average distance is small. Where the rates are high the average distance is great. This statement of course varies in some measure with the size of the city, but taking Detroit and Toronto, cities of practically the same size as Washington, where the rates of the independent company in the first named are $40 and $25, and of the Bell Company in the last named are $45 and $25, the subscribers average between 5,000 and 6,000, and here, where the rate ranges from

$72 to $125, the exchange subscribers are 2,126. One-third of the rate prevailing in this city is charged in these other cities, and the result is three times the number of subscribers in each of them, and the further result is that the average distance of two miles in this city is reduced to three-fourths of a mile in Detroit. Exactly the same experience is had in every other city where the rates are reasonable, and it must be clear to the most ordinary intelligence that where a line of wires or a cable runs out from a central exchange through the principal streets of a city, it must lessen the average distance of the telephones from the central office if wires are constantly taken off the poles or out of the conduit, and into the various houses along the line of the route.

Again, it appears in the testimony that at the time the average length of lines was stated, Washington had but one central exchange. Other cities had found it profitable to have more than one, thus reducing the average length of lines from the "central" to the subscriber. New York has 9 exchanges, Chicago 11, Detroit 3, Toronto 3, and Montreal 4, and during the pendency of this suit Washington has established two more, and now maintains three.

ARE THE STATUTE RATES UNREASONABLY LOW?

The claim of the appellant is that the statute is void because the rates fixed are below the cost of service. It was therefore necessary that it show the actual cost of service, and prove *as an inevitable conclusion and beyond a reasonable doubt* that the rates fixed are destructively low. It was bound to show "a repugnancy to the supreme law of the land too clear to admit of dispute."

Pine Grove Co. *vs.* Talcott, 19 Wall. 666.

Legal Tender Cases, 12 Wall. 531.

Henderson Bridge Co. *vs.* Henderson City, 173 U. S. 615.

San Diego Land Co. *vs.* National City, 174 U. S. 739, 759.

In the last cited case this court declared the rule in these words:

> "The only issue proper to be determined by a final decree in this cause, is whether the ordinance in question, fixing rates for water supplied for use within the city, is to be stricken down as confiscatory by its necessary operation, and therefore in violation of the Constitution of the United States."

And again it was said (p. 745):

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation, as under all the circumstances is just, both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use."

Elements to Be Considered.

In San Diego Land Company *vs.* National City, the contention of the land company was precisely that of the appellee here; that is, that in determining what are just rates the court should consider the cost of the plant, the cost of operation, including money borrowed and used in construction, annual depreciation from natural causes resulting from its use, and a fair profit to the company (p. 757). The

court, however, declared this basis of calculation defective in not requiring the real value of the property and "the fair value of the services rendered" to be taken into consideration.

And in the previous case of Smyth *vs.* Ames, 169 U. S., this court declared (p. 547), that the basis of all calculations as to the reasonableness of rates to be charged by a public service corporation must be the *fair value of the property being used* by it for the convenience of the public.

> "And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration."

And, dealing with the insistence that the corporation is entitled to earn dividends on its capital stock, the court further said:

> "It is unsound in that it practically omits the right of the public to be exempt from unreasonable exactions, and makes the interests of a corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public.
>
> "It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses,

pay the interest on its obligations and declare a dividend to stockholders."

Smyth *vs.* Ames, 196 U. S. 544.

In another case the court declared:

"It can not be said that a corporation is entitled, as of right, and without reference to the interest of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. *But that involves an inquiry as to what is reasonable and just for the public. The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.* The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. *If a corporation can not maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them, which the Constitution does not require to be remedied by imposing unjust burdens upon the public.* So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the services rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

Covington Turnpike Co. *vs.* Sanford, 164 U. S. 578.

We have no wish to add to or take from the rule declared in these three decisions of this court Applied to the facts

of this case, they sustain our contentions that the statute rates are reasonable.

THE APPELLANT HAS FAILED TO SHOW WHAT HAS BEEN THE ANNUAL EXPENSE OF MAINTENANCE AND OPERATION CHARGEABLE TO TELEPHONE USERS.

To prove such annual expense the appellant submitted certain tables (Rec., p. 1162 et seq.) made up from its books for the six years ended December 31, 1897, explained by the accountant Haskins (Rec., p. 340 et seq.). These show a total expense for the six years of $728,323.28; an average of $121,387.12 per annum for all telephones, and of $66.57 for the average number of 1,823.5 telephones in use in that period.

All Outlays Charged to Expense.

This great aggregate is reached by the process of charging to expense everything that ingenuity could provide excuse for putting under that head, as appears at a glance from the charge to maintenance, in 1897, of $106,146.60 as against $37,208.98 in 1892, $37,393.71 in 1893, $51,094.94 in 1894, $38,800.27 in 1895 and $51,948.85 in 1896; an average for those five years of $43,289.15, as against the $53,765.56 which the enormous increases in 1897 makes the average maintenance for the six years.

Specific items found in this charge to expense and not properly chargeable thereto in determining cost of exchange service for the six years are as follows:

Traveling, $9,119.41; ditto, $9,840.45; miscellaneous interest, $8,306.10; interest on first mortgage bonds, $48,027.30; deposit to sinking fund, $40,000, or $104,293 (Rec., Haskins' Ex. 1162 et seq.).

Since ascertainment of what are reasonable charges to the public requires elimination of *unnecessary* expense, the sum

of $106,205.42 paid for instrument rentals and switchboard royalties must be stricken out, for it is abundantly established that instruments may be purchased outright at little more than the annual rental paid by this company, and that switchboards may be purchased from any of many manufacturers without royalties. No rentals or royalties are paid in Europe or in Canada, and none are exacted by the many manufacturers in this country other than the Western Electric Company. Justice to the people does not require that the defendant shall deal exclusively with the Western Electric Company. The item of rentals and royalties equals $106,205.42 in the six years.

Again, it is shown that the labor of putting up the subscriber's equipment is charged to "expense," and not to "construction" (Haskins, Rec., p. 364). Since the subscribers' stations are quite as important a part of the plant as the cables which connect those stations with the central exchange, it is not clear why the labor of laying the cable should be charged to "construction" account and the labor of equipping the stations be charged to "expense." Both belong to "construction" (Thorwald, Rec., p. 811). If, however, we take from the expense account only the cost of putting in the increase in number of stations between December 31, 1891, say 1,729, and December 31, 1897 when the number was 1,929, the sum is considerable. The labor cost of a station being placed at $6 (Crandall, Rec., p. 225), this item would be $1,200 for the six years.

It is clearly shown that other items properly chargeable to "construction" have for years been charged to "expense" under the head of "maintenance." An illustration is found in the course pursued in 1897. During that year *no charge was made for construction*, except for those parts of the subscribers' stations which were purchased, *i.e.*, magnets, bell, battery, etc. (Haskins, Rec., pp. 356, 359). Yet, in that year the company drew in 29,663 feet of underground cable, against 814 feet drawn out, and put up 6,890 feet of aerial cable, as

against 83 feet taken down (Rec., pp. 87, 284). Difference, 35,656 feet. The company abandoned, *not as worthless, but for an improved method*, 12,253 feet of cable, leaving an actual increase in cable during the year of 16,596 feet, and of conductor 4,359,150 feet, and of line wire 621 miles. The conduits, or trench subways, made during the year were 8,981 feet in length, containing 51,709 feet of duct. If from this is taken the extent of conduit abandoned (172 ft. 5 in.) there is yet an increase of trench subways of nearly two miles, and of duct 51,134 feet. The increase in manholes was 30 and in poles 893 (Rec., pp. 87, 283).

The explanation as to the poles, as made by Mr. Crenshaw, to the effect that they were put up by the defendant for the American Tel. and Tel. Co. for the purpose of evading an act of Congress, and were paid for by that company, has no application to the other items, except it be 100 miles of overhead wire.

The excuse given for charging the new work done in 1897 to "expense," thus raising the item of "maintenance" more than 100 per cent over 1896, to-wit, that the cost of the work did not exceed the original cost of the solid asphalt construction which was abandoned (Rec., pp. 192–3, 200), is a bookkeeper's reason, but *does not aid in determining the reasonable cost of maintaining and operating a telephone system for 2,000 subscribers. The work done was betterments, pure and simple, and enormously increased the capacity of the plant.* The cost of the net increase in cable in that year, at the prices given by defendant's witness, Crenshaw, was about $13,694; the cost of conduit, at 25 cents per duct foot, $12,783; cost of manholes, $3,900. The addition to expense account in 1896 from the same method of charge was $21,398.85 (Report 1896). How much was similarly mischarged in previous years does not appear. It will not be unfair to estimate it at $20,000 per year for the other four years of the 6-year period.

BETTERMENTS NOT CHARGEABLE TO MAINTENANCE.

During the four years 1892–1897, the company abandoned its "solid system" of construction for the conduit system, not because the first was worn out, but because the latter was preferred (Rec., p. 184). Since the solid system had cost $114,236.15, the company's method of bookkeeping induced it to charge to "maintenance" as much of the outlay for the new work as equalled the first cost, (Rec., pp. 190, 193, 200, 202, 353, 373), of which $21,398.85 was so charged in 1897 (Rec., p. 201), and, although the capacity of the plant in cable feet was increased from 9,045 feet to over 50,000 feet, nothing was charged to construction.

As between the public and the company all betterments should be charged to construction, and be paid for by stockholders; they should not be charged to expense and be paid for by the public. *As between the company and its stockholders*, and to preserve an accurate record of *assets* for their information, only the actual cost of the plant in existence should be shown, but by what just process of reasoning a loss of plant should be paid for by the public, and not by the stockholders, is not explained by the defendant. If the telephone exchange should be destroyed by fire, the company would have equal right to charge the loss to "expense," and put up rates of service to make it good, as it had to charge to maintenance the cost of new conduits to take the place of their abandoned "solid" system. In this way the charges to expense in these four years, as they appear on Haskins' tables were increased on the average at least $28,559 per annum. Under the system adopted by this company all losses are to be borne by the public—stockholders pay nothing.

In 1897 the charge to exchange station expense leaped from the average of $110.524.31 for the previous five years, to $175,702.71 (Ex. D, Rec., p. 1166). To this enormous

outlay in 1897, reasonably explained only by the figures of increase in plant found in the annual report of the company, is due Mr. Haskins' average of $121,387.21 as annual expense, and his average expense of $66.57 for each telephone.

Union Pacific RR. Co. v. *U. S., 99 U. S. 420,* is a distinct authority for our contention, not only as to these items, but as to interest paid on bonds. The court distinctly recognized the interest of the Government in that case as "*the same as the stockholders*" (p. 421), and indicated that, if this were not the case, the cost of improvements allowed would not be chargeable to expense. In the case at bar the interests of the public and of the stockholders are not the same.

The court rejected as chargeable to expense the following items of interest here:

(*a*) Discount and interest on floating debt.
(*b*) Interest on bonds.
(*c*) Construction of bridge at Omaha.
(*d*) Deposits to sinking fund.
(*e*) Premium on bonds redeemed.

(See pp. 404 and 422.)

Of bond interest it said (p. 422):

> "All payments of interest on the bonded indebtedness of the company should be charged to capital interest account *and not to current expenditures.* . . . The bonded debt incurred for the purpose of construction and equipment is but another form of capital analagous to preferred stock, and the interest accruing thereon is in the nature of a dividend on such capital. *It has nothing to do with and can not affect the net earnings of the road.*"

Haskins' Exhibit D shows annual expense for telephones in use to have been: For 1892, $57.02; 1893, $61.70; 1894,

$67.57; 1895, $58.78; 1896, $61.26; 1897, $91.09, being an average for the six years of $66.57.

If this exhibit be corrected by deducting only the items of bond interest, miscellaneous interest, deposits to sinking fund, instrument rentals, royalties, and the cost of the new conduits to the extent of $114,236.15, the result will be as shown in the following tables:

1892.

Total exchange-station expense (Haskins).....		$99,849 71
Deduct:		
Interest.....	$8,010 00	
S. B. royalty	1,518 00	
Instrument rental.....	21,006 81	
		30,534 81
Actual expense		$69,314 90

Average number of telephones in use, 1,751.
Expense per telephone, $39.59.

1893.

Total exchange-station expense (Haskins)		$112,411 56
Deduct:		
Miscellaneous interest.....	$2,596 96	
Bond interest.....	8,000 00	
Sinking fund.....	8,000 00	
Instrument rental.....	22,192 19	
S. B. royalty	1,626 75	
		42,056 61
Actual expense		$70,354 95

Average number of telephones in use, 1,822.
Expense per telephone, $38.61.

1894.

Total exchange-station expense (Haskins).....		$122,849 30
Deduct:		
Miscellaneous interest.....	$1,374 16	
Bond interest.....	8,000 00	
Sinking fund.....	8,000 00	
Instrument rental.....	16,231 74	
S. B. royalty.....	1,609 83	
One-fourth of $114,236.15, cost of solid system carried to expense	28,559 03	
		63,774 76
Actual expense.....		$59,074 54

Average number of telephones in use, 1,818.
Expense per telephone, $32.49.

1895.

Total exchange-station expense (Haskins).....		$102,396 62
Deduct:		
Miscellaneous interest.....	$2,166 99	
Bond interest.....	8,000 00	
Sinking fund.....	8,000 00	
Instrument rental.....	12,051 74	
S. B. royalty.....	1,710 66	
One-fourth cost of solid system charged to maintenance.....	28,559 03	
		60,488 42
Actual expense.....		$41,908 20

Average number of telephones in use, 1,722.
Expense per telephone, $24.34.

1896.

Total exchange-station expense (Haskins).....		$115,113 35
Deduct:		
Bad accounts charged off.....	$2,596 96	
Miscellaneous interest.....	1,002 20	
Bond interest.....	8,000 00	
Sinking fund.....	8,000 00	
Instrument rental.....	12,092 07	
S. B. royalty.....	1,672 67	
One-fourth cost of solid system charged to maintenance.....	28,559 03	
		61,922 93
Actual expense.....		$53,190 42

Average number of telephones in use, 1,879.
Expense per telephone, $28.36.

1897.

Total exchange-station expense (Haskins).....		$175,702 74
Deduct:		
Bad accounts charged off.....	$1,108 77	
Miscellaneous interest.....	1,476 52	
Bond interest.....	8,027 30	
Sinking fund.....	8,000 00	
Instrument rental.....	12,775 71	
S. B. royalty.....	1,084 74	
One-fourth cost of solid system charged to maintenance.....	28,559 03	
		61,032 07
Actual expense.....		$114,670 67

Average number of telephones in use, 1,929.
Expense per telephone, $59.45.
Average annual expense per telephone for six years, $34.56.

If the average annual revenue per telephone for the six years had been $50, the difference between the expense and revenue would have sufficed to pay 3¾ per cent on the capital stock of $750,000, or 6.2 per cent on $450,000, the value of the entire plant, or more than 9 per cent on the value of the plant in use.

OTHER JUST DEDUCTIONS.

1. Why should 2,000 telephones be taxed with either the cost of construction or cost of maintenance of a system prepared for five times that number? The company for the whole period from January, 1884, to January, 1898, averaged 1,507 exchange telephones per annum, and for the last six years averaged 1,861, but it constructed an outside system of conduits and ducts capable of serving 11,335 subscribers in the same manner as those who actually had service. Nearly two-thirds of the entire duct capacity *was unused for any purpose* (Annual Report, Rec., pp. 85–6). In determining the reasonable annual expense per telephone, it is not fair to charge the entire cost of the maintenance of this system against the few telephones in use, nor is it just to allow to the company interest on first cost of a plant *unnecessarily large*, and built so large only with an eye to a larger business. The 2,000 telephones should be charged only with their fair proportion of both items. The company, in proving expense, should have made the division, but has not done so. There is testimony to show that the alleged total cost of the company's outside plant was about $400,000. Of this three-fourths was chargeable to conduits (Rec., p. 1071). The telephones in actual use then should not have been charged with the maintenance of more than about $200,000 of this outside plant, even if the company's figures of cost be accepted.

2. The labor expense in installing subscriber's stations, improperly charged to maintenance (Rec., p. 364), aggregated for the *increase in stations* for the six years, $1,200. This was a proper charge to construction, and not to current expense or repairs, and should be deducted from expense.

Another error in favor of the company is apparent:

Mr. Haskins, in Exhibit D, includes among receipts, *rentals* from "*private lines*," and in expenses includes royalties, rentals, etc., of "*private lines*," but when he comes to average the expense among the telephones, he divides by the number of exchange telephones only, leaving out the "private line" telephones, which on December 31, 1897, were 468 (Rec., p. 349). It is clear from simple division that he obtains his average expense by dividing by the number of telephones at the head of his table "D," and that these do not include the "private lines," is evident by comparing the average number of telephones for each year of his table with the number of exchange stations on January 1 of each of those years as per table (Rec., p. 165).

He also shows "private lines" are not included in number of telephones by his table of "Miscellaneous Statements" (Rec., p. 1169).

In Exhibit "D" when he gets "average per 'phone" of total expense (including expense of private lines as per Exhibit A), he divides by 1,823.5 average exchange telephones, and divides by same number when he gets average per telephone of *exchange stations only*.

Haskins also leaves out the "484 private lines" (Rec., p. 350) when he calculates the average receipts and expenses per telephone for nine months, to September 30, 1898, although he includes the receipts and expenses from "private lines" (Rec., pp. 346, 348). This is clear because he divides by 2,126 telephones to get his average per telephone, and that is the exact number of "exchange 'phones" to September 30, 1898 (Rec., p. 350).

The claim that $71.20 was the average expense per telephone in 1898 is based on Mr. Haskin's tables for the first nine months of that year (Rec., pp. 345–349), but it is apparent that to reach this result Mr. Haskins used an incorrect divisor. He divides his alleged gross expenses by 2,126 as the "average number of telephones in use," but in using this number he ignored the "private lines" and used only the exchange instruments. The true divisor was 2,610 as he himself shows (Rec., p. 350), by using which his average cost per telephone for the year is reduced to $58.12 without making any further correction of his statement.

The same error is found in Haskin's statements for the six years shown in Exhibits A, B, C, D, in each of which years in determining average expense per instrument he has used a divisor too small by the number of private lines (see "Miscellaneous Statements"). The following table shows the result of using the correct divisor without making other corrections heretofore or hereafter referred to:

1892. Exchange telephones 1,751
Private " 337=2,088 telephones
Total expense.....$106,121.33
Expense per telephone..... $50 82

1893. Exchange telephones 1,822
Private " 340=2,162 telephones
Total expense.....$119,167.86
Expense per telephone..... $55 57

1894. Exchange telephones 1,818
Private " 340=2,158 telephones
Total expense.....$129,045.89
Expense per telephone..... $59 33

1895. Exchange telephones 1,742
Private " 356=2,098 telephones
Total expense.....$108,102.75
Expense per telephone..... $51 57

1896. Exchange telephones 1,879
Private " 393=2,272 telephones
Total expense.....$121,794.24
Expense per telephone..... $53 21

1897. Exchange telephones 1,929
Private " 468=2,397 telephones
Total expense.....$186,276.79
Expense per telephone..... $77 71
Average for the 6 years of expense per telephone... $58 03
Average number of telephones, 6 years, 2,196.

If we take the real average number of telephones for the six years covered by the Haskins tables (Exhibits A, B, C, D) instead of exchange instruments only, and strike out from the charges to expense the items shown not to be proper charges as against this statute; that is to say, rentals and royalties, interest on mortgage bonds, deposit to sinking fund, traveling expenses, increase of plant charged to maintenance, the statement will be:

Average annual receipts per telephone ($193,307.41, divided by 2,190)			$88 22
Average annual expense		$128,418 16	
Less rentals and royalties	$19,822 67		
Less interest on bonds...	8,000 00		
Less deposits to sinking fund	6,666 67		
Less traveling expense..	3,159 98		
Less one-sixth of $114,236.15, as before	19,039 35		
Less cost of subscriber's connections	200 00		
		56,888 67	
		$71,529 49	
Average annual expense for 2,190 telephones			32 66
Net receipts per telephone			$55 56

If instead of using the average number of all telephones in use, as well on exchange lines as private lines, we use as a divisor 1,823.5, the average of exchange telephones (Rec., p. 1166), as was done by Mr. Haskins in his computations, the average expense per telephone will be increased to $39.22.

We submit that if either of these results is approximately correct, it will be idle to claim that the rates fixed by the statute are too low for profit.

Mr. Bryan's Estimates (Rec., p. 136).

Mr. Bryan, president of the company, estimates the income of the defendant company, under the act of Congress, as of June 30, 1898, the day of its passage. He furnishes a table itemizing the sources from which it will be derived, the total amounting to..... ..... $91,765.

He has made some remarkable errors. He forgot Haskin's "Exhibit A," which contains, in addition to receipts from subscribers, eleven other sources of income not affected by the act of Congress, which in 1897 amounted to $12,337.99. This does not include the income from private lines nor that from local pay stations, which latter alone yielded $9,946.47 in 1897, and $10,864.21 (Rec., p. 348) for the first nine months of 1898.

Mr. Bryan also forgot the 490 "private lines" existing July 1, 1898, the day after the act passed; these would yield annually $24,500 under rates fixed by the act.

That these private lines are not embraced in Mr. Bryan's table (Rec., p. 136), is shown by the fact that his table (Rec., p. 136) gives total number of telephones at 2,003, while Haskin's table (Rec., p. 350) gives "exchange 'phones" as 2,135 on July 1, 1898, and private line telephones as 490 just one day after the act was passed, and Haskin's table (Rec., p. 348) states the average number of exchange telephones for the nine months ending September 30, 1898, as 2,126.

Mr. Bryan should have added 132 exchange telephones to his estimate of income (Rec., p. 136), being the difference between 2,003 as of June 30, 1898, and 2,135 as of July 1, 1898 (Rec., p. 350).

EXTRAVAGANCE IN SALARIES.

A grave instance of extravagance is found by comparison of the list of officers and employees of the defendant with similar lists from other companies.

We compare with Toronto (5,932 stations), Norfolk (1,300 stations), the Home Tel. and Tel. Co., at Fort Wayne (1,624 stations), excluding in the comparison the working force in the operating room and the laborers, linemen, etc., outside:

Washington Employees and Salaries
(Rec., p. 75, Ex. 1).

Manager, 2-5 of $8,000	$3,200
Secretary to manager, 2-5 of $1,500	600
Secretary, 2-5 of $2,100	840
Treasurer, 2-5 of $3,000	1,200
Auditor, 2-5 of $1,500	600
Stenographer, 2-5 of $600	240
Two assistant stenographers	840
One contract clerk	1,200
Nine clerks, 2-5 of $6,640	2,656
Two clerks, construction department	980
Two office boys	624
One messenger	156
Draftsman	1,040
Two collectors	1,744
Two canvassers	1,120
One chief of operating room	1,200
Total for office	$18,240

Outside Force.

Superintendent of construction, 2-5 of $2,100.....	$840
Superintendent of equipment, 2-5 of $2,100.....	840
Chief inspector.....	1,200
Five assistant inspectors.....	4,060
Switchboard man.....	720
Three test operators.....	2,426
Six instrument men.....	3,432
One battery man.....	600
One cable inspector.....	1,000
Carpenter, $936; janitor, $250; teamster, $300; storekeeper, $520.....	2,276
Apprentice.....	260
Engineer.....	900
Fireman.....	540
Two foremen.....	2,000
	$21,094

Inside force.....	$18,240
Outside force.....	21,094
	$39,334

Average per telephone station (2,126 stations) $18.50.

Toronto Employees (Rec., pp. 972, 974.)

Inside Force.

Manager.....	$3,000
Cashier.....	1,000
Bookkeeper.....	600
Seven clerks.....	1,610
Two clerks.....	1,020
One clerk construction department.....	780
Four collectors.....	1,080
Three chief operators.....	1,320
	$10,410

Outside Force.

Superintendent	$1,760
Twenty-two inspectors	9,420
Four instrument men	984
Two cable men	1,200
Carpenter, teamster, janitor and storekeeper	1,920
Foreman of linemen	1,200
Two subforemen	1,560
	$18,044

Inside force	$10,410	
Outside force	18,044	
	$28,454	

Average per telephone station (5,932 telephones), $4.80.

The Toronto exchange is in the "department" of Hamilton, whose manager controls 150 offices and has headquarters at the city of Hamilton. Again, the general offices of the Canadian Bell Telephone Company are at Montreal. Although no showing is made that the office force at Hamilton render any service to the Toronto office (Rec., p. 978), counsel for appellant insist that one-third of all the Hamilton office expense, or $4,172, should be charged to Toronto. Allow this, and the expense per telephone is raised to $5.49. And although there is nothing in the testimony to show what is a just proportion of the expense of the "head office" maintained at Montreal which should be charged to Toronto, the appellants urge that seven dollars per instrument should be allowed, this being stated to be the rate of "head office" expense (Rec., p. 977) for all instruments in the 343 exchanges and 340 agencies (Rec., p. 956) in use by this company. This adds $41,524 for such bookkeeping and auditing as may be done at the head office for Toronto, all local bookkeeping being done at Toronto (Rec., p. 976). But, allow even this in addition to the Hamilton office expense, and the total is only $12.49 per telephone, as

against $18.50 for Washington. Enough to aggregate $12,756, or four per cent on more than the cost of the plant in use.

Fort Wayne, Ind., Employees (Thorwald, Rec., p. 704).

1624 Telephones.

Manager	$900
Secretary	600
Electrical engineer	1,080
Bookkeeper	780
Stenographer	240
Two inspectors	720
Two collectors	840
One switchboard man	720
Two trouble men	1,080
	$6,960

Average per telephone, $4.29.

At Norfolk, Va., the salaries of the entire office force are but $4,218, or about $3.25 for each telephone station.

It is of interest in this connection to note the estimates of the Engineers Ahern and Dunbar for salaries for conducting a plant of 2,000 telephones. Mr. Ahern, for many years at the head of the maintenance department of the Chicago (Bell) Company, calculates salaries at $15,280 (Rec., pp. 2, 749), while Mr. Dunbar's estimate reaches $15,600, these estimates being made quite independent of each other. Neither estimate reaches $8 per telephone.

It will be seen that the defendant's salary list above, *excluding wages paid operators, laborers and linemen*, is more per telephone than the entire expense to the Citizen's Telephone Company, of Grand Rapids, Mich., with its 2,500 telephones, and 50 per cent more than the entire expense at Fort Wayne, and within about $7 of the entire expense per telephone, including head office charges, of the Toronto plant.

We submit that under all the proofs it does not appear that the salary list of the appellant is reasonable and fair to the public, but on the contrary it appears that it is grossly excessive, and in a just estimate of reasonable expense of operation it should be reduced by at least $15,000 per annum.

Other Evidences of Extravagance or Incompetence of Management.

This company has shown its want of business ability by its failure to make money at high rates under conditions exactly similar to those under which many other telephone companies have found profit at low rates.

This company conducts exchanges in Cumberland, Westminster, Hagerstown and Martinsburg, where its charges range from $72 and $60, for a metallic circuit, to $36 and $30 for a grounded circuit (Rec., p. 205). In these places the wires are all aerial; there is a lower scale of construction than in the cities; the switchboard is not a multiple board, and no royalties are paid upon it. It is cheap to construct and cheap to operate. The requirements of the subscribers are much less. Help can be procured at a very low rate; a manager can be had at $10 per week; he will act as manager, collector, disbursing officer, connect instruments, inspect the plant and climb poles. They have there a common battery and sometimes as many as six subscribers on a line of iron wire (Rec., pp. 279, 280).

In the face of all these advantages, and with rates from two to three times as high as other places of equal size, this company loses money constantly. This is established by Mr. Bryan's testimony (Rec., p. 280) and by the table A in Tompkin's report.

In Michigan, the New State Company's rates are $24 and $18; they have always made money (Rec., p. 571); and

these are the rates which generally obtain for independent companies throughout the smaller cities of the Central West (Rec., p. 632).

These extravagances of the management of the Chesapeake and Potomac Company are stated for the purpose of showing that whatever may be the result financially of the operations of this company, it would be manifestly unfair to overturn an act of Congress because this company can not earn expenses and dividends, in view of the fact that its management has been most extravagant and inefficient, and especially when it appears that other corporations in towns and cities of like size, with less than half the rates of charges, have been able to earn a reasonable income.

Proofs from Other Cities.

The business of telephony having been a monopoly in appellee in this District, there were but two courses open to the complainants in the cause, one being to accept defendant's proofs as to costs and value of the plant, necessary cost of operation and maintenance, and its opinions as to economy of management and probable results of service under the statute; the other to show the cost of similar service elsewhere under nearly similar conditions, the rates charged when competition has fixed them, and the financial results with low rates, and thus establish the "fair value in themselves of the services rendered."

In *Smyth* v. *Ames* (p. 540) the court declared a mere difference in rates of railroad charges in two States to be of comparatively little significance, but this was because of the great differences in population, extent of business and mileage earnings in the two States, there being in Iowa 230 people to the mile of railroad, and in Nebraska but 190. *In the nature of things such differences can not exist between Washington and all other cities in the United States and in Europe in*

the business of telephony, and therefore, for the purpose of showing the fair value of the services, and establishing a market value of what the defendant has for sale, we took proof of methods, rates and results in other cities.

If the sole question to be determined is as to the ability of the Chesapeake and Potomac Company to earn dividends on its stock with its past methods of management, under the rates fixed by the act, then this testimony is probably not of great force, but if the public interests are to be considered in conjunction with those of the company, then it becomes important to learn the real value in themselves of the services rendered by this company. How can we better do this than by showing what similar services cost in other cities, and what it requires to maintain annually telephone plants in other places of practically like size and population?

Again, if the earning of a profit by the Chesapeake and Potomac Company is the sole measure by which the act of Congress is to be tested, then it is probably of little consequence to have shown city after city in which the rates are lower than those fixed by Congress; that in no single instance in any city of any size does an independent company charge more than the rates limited by Congress; that in no city on the American continent, large or small, do the rates exceed those of the act, *except where a licensee of the American Bell Telephone Company has a monopoly and controls the rates,* and that in every case where competition has been introduced, the Bell Company has reduced its rates to less than those of the independent company, and continued to do business.

But if the rights of the public are to be considered, then these facts become of great importance as showing the market value of telephone service, and thus the real value in themselves of what the defendant company furnishes the public in this District.

The Fair Market Value of Telephone Service as Shown by its Price Elsewhere.

We give here the names of cities abroad and in this country about which proof was taken, with number of telephones and rate for standard service.

City.	*No. Telephones.*	*Annual rate.*
London, England	8,000	$100 00
Liverpool, "	8,000 (1146)	50 00
Glasgow, Scotland	8,000 "	50 00
Stockholm, Sweden	16,700 (1136)	21 60
Vienna, Austria		40 00
Paris, France		80 00
Berlin, Germany		37 50
Montreal, Canada	7,260	$50 and $30
Toronto, "	5,755	50 and 30
Quebec, "	1,592	40 and 30
Ottawa, "	1,508	40 and 30
Detroit (Bell Co.)	4,000	36 and 24
" (Ind. Co.)	4,936	40 and 30
Grand Rapids, Mich	2,525	30 and 20
Fort Wayne, Ind	1,624	36 and 24
Richmond, Va	1,300	36 and 24
Norfolk, Va	1,300	30 and 25

Washington, D. C., with about 2,000 telephones, charges as its standard rates for service on metallic and grounded circuits, respectively, to business houses $125 and $100, and to residences $100 and $72 (Rec., p. 146).

With the evidence before it that the rates given in the foreign cities have been charged for a number of years, the court will assume that they have not been below cost. They certainly show the market "value of the services" in those places. But there is direct testimony to profit, and this from a witness called by the defendant. Mr. Herbert Laws Webb, an expert in telephone matters (Rec., p. 1141), who investi-

gated the service in Great Britain, Norway, Sweden, France, Belgium, Germany, Austria and Switzerland, testifies that the private company operating in Great Britain pays dividends on five million pounds sterling of capital stock (Rec., p. 1149), and that in an official investigation of rates in Great Britain it was shown that the private company at Stockholm had earned 8 per cent per annum dividends on their capital "from the very beginning" (Rec., p. 1148). The rates for service are about $26.80 for service of the highest class, and $21.60 and an installation charge of $2.68 per year for five years, for the ordinary business telephone (Rec., p. 101).

As shown by Mr. Ferguson (Rec., p. 859), the service in Stockholm is over the metallic circuit and equal to the service in Washington and is almost entirely underground (Rec., p. 860). The population exceeds 250,000.

Results in America With Low Rates.

The defendant, a corporation under the control of the American Bell Telephone Company, which owns three-fifths of its stock, and which conducts the telephone business of most of the important cities of the Union, gave *no evidence of cost of service in any of those cities*, but did afford us a view into the cost of service in the Canadian city most nearly like ours. This view is most instructive. For complainants, we made exact proof from a number of cities.

Canada.

The Canadian Bell Company operates from Rocky Mountains to east limit of province of Quebec; principal cities being Montreal (pop. 250,000), Toronto (pop. 230,000), Quebec, Manitoba, London, Hamilton. Until recently this company manufactured all its own telephone apparatus, including telephones and switchboards (McFarlane, Rec., p. 569), which makes them (Rec., p. 968). It pays no royalties

and now owns 95 per cent of the stock of the company (McF., Rec., p. 966).

On January 1, 1899, it had 32,082 instruments earning rental, of which 20,889 were in the ten largest exchanges, and about 2,500 toll stations (McF., Rec., p. 963). It does not appear that the American Bell Telephone and Telegraph Company is interested in the Canadian company (McF., Rec., p. 964). Capital stock outstanding, $3,168,000; par value of shares $100, worth $175 to $180 in the market (Rec.; Fleming, p. 537; Sclater, p. 1004). Dividends have been 8 per cent for some years past (Sclater, Rec., p. 1004), and before that were 7 and 6 per cent (Rec., p. 1008).

The officials of the company refused to permit any examination of its books (Sclater, Rec., p. 1006) or to produce its annual statements to stockholders (Sclater, Rec., p. 1005), but a copy of its annual statement for 1897 was put in evidence by complainants (Rec., p. 101). The "Revenue Account" for the year gives results as follows. We quote the whole of it:

Receipts.

Exchanges	$862,319 29
Long distance lines	229,917 98
Private lines	12,619 01
Miscellaneous	80,828 93
	$1,185,685 21

Expenses.

Operating	$825,038 94
Legal	7,725 51
Insurance	23,733 68
Bond interest	45,683 30
Miscellaneous	3,752 21
	$905,933 64

Net revenue for 1897	279,751 57
Less dividends (inc. Jan. 15, 1898)	253,440 00
	$26,311 57
Balance revenue from 1896	56,052 60
Carried forward in 1898	$82,364 17

The same exhibit shows that this company has also accumulated a contingent fund of $800,000.

Of the 32,082 instruments under rental in Canada, there are 19,673 in the seven principal cities, as follows:

Montreal, 7,260; Toronto, 5,755; Quebec, 1,592; London, 1,124; Winnipeg, 1,093; Hamilton, 1,341; Ottawa, 1,508 (Rec., p. 9, 65).

The rates charged in no case exceed the rates fixed by our statute, being as follows (Rec., pp. 981–3):

	Business.	Residence.
Montreal	$50 00	$30 00
Toronto, prior to 1891	50 00	30 00
Toronto, since 1891	45 00	25 00
Quebec, on one-year contracts	40 00	30 00
Quebec, on three-year contracts	35 00	25 00
Ottawa	40 00	30 00

The instruments in use are principally of the Blake transmitter type (Rec., p. 966).

Testimony of financial results in any city was given only as to Toronto, and to that we ask attention.

Toronto.

The increase of instruments has been from 2,969 in 1889 to 5,932 in 1898 (Rec., p. 969), and the greater portion of the system in the central part of the city is underground (Rec., pp. 534, 968).

Business telephones, 4,060; residence telephones, 1,872.

In January, 1897, the Bell Company of Canada petitioned the Governor-in-Council for leave to increase its rates to subscribers. For some reason not explained, the company presented a statement of revenue and expenses for 1895 only, in the three cities—Montreal, Ottawa and Toronto. This statement showed the "expenses" (?) of the Toronto exchange to have been $252,597.30, or $53.63 per telephone, and showed a loss for the year of $79,877.74 (Rec., p. 988). The Governor-in-Council sent to examine the books for verification of this statement Mr. Ormond Higman, an *electrical engineer*, who testifies that his "*examination of the books*" of the company satisfied him the statements were substantially correct (Rec., p. 988). That Mr. Higman was easily satisfied, and that the books *did not show such expense*, is made clear by the testimony of Mr. Sclater, secretary-treasurer of the company, who states that "*one item was specially prepared* (Rec., p. 997) for Mr. Higman," it being an *estimated* depreciation of 15 per cent, which "they had been informed" was the proper one to reckon. This assumed depreciation made a difference of $102,933 in the item of expense (Rec., p. 998), enough to change the stated loss of $79,877.74 *into a profit of more than* $23,000.

So, also, in 1897, the supposed loss of $22,867.47 (Rec., p. 999) is arrived at by charging to expenses $68,036.63 for assumed depreciation; and in 1898 the supposed loss of $14,715.78 is arrived at by charging to expense $71,153.83 of assumed depreciation. A just statement of revenue and expense would have shown profits in each year, as follows:

1895	$23,055 26
1897	45,169 16
1898	56,438 05

That the item "depreciation" does not mean "deterioration" is shown by Mr. Sclater (Rec., p. 1000). Other bookkeepers would style it "surplus fund."

It is also to be borne in mind that during 1895 the five

years' contract made in 1891 with the city of Toronto was in force, and that this required payment to the city of 5 per cent gross receipts (Fleming, Rec., p. 536). The amount thus payable in 1895 was $8,635. Since *the appellant pays no franchise tax*, this item, for the purpose of comparison of the business in the two cities, should be taken from the expenses for that year, the total receipts over all other business outlays thus appearing to have been in 1895, $31,691.21.

By reforming the statements of Mr. Sclater of receipts and expenditures by striking from "expenses" the sums included by him for "depreciation," and for 1895 the franchise tax, the account will stand as follows:

1895.

		No. of Subs.	Per Sub.
Revenue	$172,719 56	4,710	$36 67
Expense	141,028 35		29 99

1897.

		No. of Subs.	Per Sub.
Revenue	$189,591 96	5,330	$35 76
Expense	144,422 82		27 10

1898.

		No. of Subs.	Per Sub.
Revenue	$205,253 36	5,932	$34 60
Expense	140,815 31		25 26

It is also to be remembered that in each of the years in question about seven dollars per subscriber (Rec., p. 999) was charged up under the head of "general expense" for the "head office," expense at Montreal, "things that are paid here for the general benefit of the company, and not for the individual place" (Sclater, Rec., p. 1008).

These statistics are a striking refutation of the claims of the defendant, and prove—

First, That good telephone service in a city of large size can be rendered at a cost of less than $30, and

Second, THAT THE COST OF MAINTAINING EACH STATION DECREASES WITH AN INCREASE IN THE NUMBER OF STATIONS.

Detroit.

There are two telephone companies—the Michigan Telephone Company (licensee of the American Bell Company) and the Detroit Telephone Company (Independent).

The Michigan Telephone Company.

The information of the affairs of this company is meagre, owing to the refusal of its manager to testify unless forced to do so (Forbes, Rec., p. 1050). It appears to have about 4,000 subscribers. No statement was had of receipts and expenses.

Mr. Akin, formerly accountant for the Michigan Telephone Company, testified that just prior to leaving its employ, in August, 1897, he determined, by careful investigation of the accounts, that the annual cost of maintaining each telephone was $16.94 (Rec., p. 574).

In rebuttal one Harry J. Boothe, present auditor of the company, produced a letter book containing an impression copy of a typewritten paper, unsigned and unidentified by any witness, purporting to show expenses per subscriber to have been $20.48 for the last five months of 1896, and $16.95 for the first five months of 1897. This paper is shown to be incorrect by the same witness, who reaches a different result in dollars and cents by *assuming* as correct the unproved statement of the discredited paper as to the number of subscribers. The witness admits having reached his result only by examination of entries in a book not of first entry, and even these entries were not put in evidence. But his statement would make the average annual cost only $43.91.

It can not be said there is any satisfactory proof on either side. It might have been furnished had the defendant seen fit to compel it.

The rates charged by this company until October 1, 1897, were $72 and upward. Since then for the ordinary telephone $36 and $24 (Rec., p. 453).

Detroit Telephone Company (Independent).

Was organized in 1896 in competition with the Michigan Telephone Company. Its franchise from the city entitles it to charge on one-year contracts, $45 for business houses and $30 for residences. Its charges are, however, $40 and $30 (Holmes, Rec., p. 451). January 1, 1899, it had 4,936 telephones in use (Rec., p. 451). Capital stock issued, $517,000; bonds, $600,000, at 6 per cent. Receipts from rentals in 1898, $165,773.97; total expense, $97,097.92, exclusive of $36,000 interest on bonds. Receipts over expenses, $68.676.05. The company gained 600 telephones in 1898, giving it an average of 4,636 during that year. Its expense per telephone was, therefore, about $20.95 (Holmes, Rec., p. 451).

Wires are all underground within the mile circle, and many underground outside that circle (Rec., p. 452). The company is constantly extending its lines. It paid taxes in 1897, $7,000, and in 1898 $10,000, and furnishes seventy-five free telephones for use of the municipality (Holmes, Rec., p. 568).

New State Telephone Company.

The testimony as to this company and the financial results of its rates is complete. November 1, 1898, it operated 134 exchanges in Michigan, and about 3,000 telephones the largest exchanges being Ann Arbor, with 505 telephones, and Port Huron with 313 (Rec., p. 578), and the smallest, Dearborn, with 4. The system is almost exclusively the metallic circuit, and the instrument of the long-distance type (Akin, Rec., p. 581). The rates for service are $24 for business and $18 for residence telephones (Rec., p. 599).

To determine the results all original papers were produced

for the examination of counsel, and the fullest exhibit made from August, 1897, to October 31, 1898 (Rec., p. 571).

For the ten months beginning January 1, 1898, the gross receipts of this company were $59,904.74, *of which* $30,714.62 *was profit* (Rec., p. 574).

It will be urged that these are but small exchanges, and that the results with them do not illuminate the question of rates in large cities. There might be force in this were it not that at its exchanges at Cumberland, with 180 stations; Westminster, with 46; Hagerstown, with 59; Martinsburg, with 39, the defendant company charges for metallic circuit service for business uses $72, and for residences $60 (Bryan, Rec., p. 205). So great has been the difference in management that while the Michigan company makes with its rates an enormous profit, Mr. Bryan testifies (Rec., p. 280) that the last time he had occasion to investigate the matter he—

> "found that for several years the business in some of the towns had been carried on at a loss, while others showed in some years a loss, and at no time any material profit."

No explanation has been offered why charges of $24 will yield a great profit in Michigan, while for practically the same service in Maryland a charge of $72 results in loss.

We submit that this significant fact only illustrates the extravagance and incompetence of the management of the defendant company.

Similar rates to those charged by the New State Company are the rule in all independent telephone exchanges in Michigan, Illinois and Indiana (Rec., Ware, p. 484; Keelyn, p. 632).

Grand Rapids.

Bell Company.

This company had, on December 1, 1898, 1,272 telephones (Ware, Rec., p. 488), and in February, 1899, about 1,300 tele-

phones (Berry, Rec., p. 1034). In spite of the loss which would result from having more telephones in use (*sic*), it carries on "a systematic canvass for business" (Berry, Rec., p. 1034). Rates for service: Metallic circuit, long-distance, $48 and $36; "ordinary service, such as is given in the telephone business generally," $24 and $12. The officers of this company declined to say if it does business at a profit or at a loss (Forbes, Rec., p. 1050).

Citizens' Telephone Company.

Since the proof about this plant is exact, and the number of instruments in use closely approximates those in use in Washington, the results shown are most important.

This company has operated since July 1, 1896; its construction is aerial, all service over the metallic circuit; its instruments are of the long-distance type (Ware, Rec., p. 482). The actual cost of construction to January 1, 1899, was $169,000. The company has issued no bonds, but built the plant from sales of stock, of which, on July 1, 1898, it had issued $129,000 (Rec., p. 480). It has 2,508 stations; its franchise limits rates to $36 and $24, but the rates charged are $30 and $20 on three-year contracts (Rec., p. 481). The construction is first-class (Rec., p. 480), and cost $65 to $67 per station (Rec., p. 494). *It operates its 2,508 lines at an annual cost of $18 per telephone* (Ware, Rec., p. 483). Its receipts for the year ended June 30, 1898, were $57,000 and its expenses $37,000 (Rec., p. 483), the average number of telephones in use being 2,200. The expense includes $1,860 for taxes. For a year and a half the company has paid quarterly dividends of 2 per cent each (Rec., p. 483).

It is noticeable that Grand Rapids, with a population of 100,000 (Rec., p. 484), has more than 3,800 telephones (Citizens', 2,525; Michigan Company, 1,300), while Washington, with nearly or quite 300,000 inhabitants, has less

than 1,700 telephones among its citizens outside the Government buildings!

Fort Wayne, Ind.

Population, 50,000.

There are two rival companies at Fort Wayne—the Central Union (Bell licensee), with 792 subscribers, and the Home Telephone Company (Independent), with 1,624 subscribers (Thorwald, Rec., p. 799).

The Central Union.

This company operates over the States of Ohio, Indiana and Illinois, and has about 250 exchanges (Rec., p. 792). Rates in Fort Wayne, $24 and $10 for ordinary service. It has about twenty-five metallic circuit lines with long-distance telephones, for which the charges are $60 and $42 (Rec., p. 1061). The only witness sworn as to the affairs of this company, the manager at Fort Wayne, testified that he had not access to the books of account so as to tell what were the receipts and expenses (Taylor, Rec., p. 1061), but he thought "the business was not profitable."

Home Telephone Company.

Has two exchanges in Fort Wayne and connects through toll lines not owned by it with fifty to seventy-five towns in the neighborhood (Thorwald, Rec., p. 798).

Has two miles underground conduit, containing eight miles of duct. About 40 linear miles in Fort Wayne system. City has about 50,000 population (Rec., p. 806) and has five lines of electric street railways. December 31, 1898, the company had 1,624 instruments in use in Fort Wayne, being an increase from 1,320 during the year. About one-half of the lines are metallic circuits, the others have the common return (Rec., p. 807). All business telephones are of

the long-distance type. Of the 1,624 telephones on December 31, 1898, 562 were business and 1,020 residence, and 39 free for city officials. Regular rates, $36 and $24, or $48 for both to one person. Capital stock authorized, $250,000; issued, $125,000. Bonds, $125,000, bearing 6 per cent interest. Cost of construction, $247,748.33 to October 1, 1898, the expenditure for construction during the preceding year being $50,243.49 (Rec., p. 831).

Detailed monthly reports of the business from October 1, 1897, to December 31, 1898, and the annual report to stockholders, made October, 1898, were produced for inspection of counsel, and the annual report was put in evidence (Rec., p. 803). This shows earnings for the year, $32,674.92; expense, $17,846.85; net earnings, $14,828.07, out of which was paid for interest on bonds, and dividends, $10,793.54. Dividends of 6 per cent per annum were paid. A share of stock being given with each bond purchased, this means 12 per cent on the cost to owners.

The cost of operating and maintaining the plant, including every item of expense, was, for the year ending October 1, 1898, about $12.57 per instrument, this result being attained by dividing the total expense ($17,846.85) by 1,419, the average number of telephones in use (Rec., p. 802).

The "undivided profits" at that time were $4,755.55. The operators cared for 100 lines each when the company had 800 subscribers, and they yet care for the same number. (Thorwald, Rec., p. 1058).

Richmond, Va.

The independent company, the Richmond Telephone Company, commenced business July 1, 1896, with less than 600 telephones, and now has about 1,300 (Rec., p. 863). Service is all metallic; no party lines. Construction aerial on large cables strung on poles 60 feet high, put up in the alleys (Rec., p. 864). Poles are all chestnut. The company paid for construction $75 in its bonds for each telephone

station up to 1,200 (Rec., p. 865). Pays $10.50 for telephones, buying principally from American Electric Telephone Company, and Western Telephone Construction Company, and uses switchboard made by latter company. Pays taxes to city of about $3,000. Rates $36 and $24 (Rec., p. 866). In 1898 the average from telephone rental was $32.68 each for the year. Amount collected, $36,720.10; then number of telephones, 1,229; average collected per telephone, $29.89; average expense per telephone, $23.61 (Robertson, Rec., p. 869). Before the company commenced business the Southern Bell Telephone Company occupied the field. Its rates were $60 and $48 for first half mile; now $30 and $18 (Rec., p. 873). The plant of the Richmond Company has all been constructed from $95,000 bonds sold, and earnings above expenses. Copper wire is used in all cables, and steel wires between cables and houses (Rec., p. 878). Over two-thirds of the telephones are in use by business houses (Rec., p. 886).

Norfolk, Va. (Rec., p. 924 *et seq.*)

Southern States Telephone Company (Independent) does business in Norfolk (population, 45,000), Portsmouth (population, 18,000), Berkeley (population, 6,000), and Norfolk county. Has 1,300 telephones in operation. All metallic circuits (Rec., p. 951). Ten per cent of business territory underground; 6,000 feet submarine cable (Rec., p. 927); pays the city 3 per cent of gross receipts, $600 per year license tax and $1 per year for each pole; State tax of 75 cents on each transmitter and $2,000 stock tax. Total tax, 14 per cent of gross receipts. Cost of plant, $110,000, or about $100 per station (Rec., p. 939); bonded debt, $45,000; rates, $30 and $25 (Rec., p. 944). Salaries of president, vice-president, treasurer and secretary, superintendent, cashier and bookkeeper, collector and others in office, $4,218 (Rec., p. 946). Annual expense of operating room, $7,070;

maintenance, $6,356. Rates of Bell Company before this company started, $60 and $40; present rates, $30 and $18 (Rec., p. 946).

In 1898 total receipts, $26,677; exchange rentals, $25,236; total expense, $22,216; exchange expense, $20,170; average number of telephones during year, 1,163; *average expense per exchange telephone*, $17.35. Still another example of low cost of maintenance is found in the case of the Interior Department telephone system at Washington, in which 145 stations cost for all expenses of care and repair during four years, (July 25, 1895, to July 22, 1899), $2,150.46, an average of less than $3.71 per station per annum. It is freely admitted that faulty construction of parts of this system, and the grossest neglect have made its service far from perfect, but the proofs of complete efficiency in operation of equipments of similar manufacture are ample to show that with the commonest attention from the electrician (?) employed to care for it, the charge of inefficiency could not have been sustained. For proof establishing the neglect of care see the cross-examination of the witness Mareau (Rec., p. 1097 *et seq.*).

Summary of Proof of Cost in America.

City.	No. of Stations.	Annual Cost per Station.
Toronto	5,932	$25 26
Detroit	4,636	20 95
Other Michigan towns	3,000	9 73
Grand Rapids	2,525	18 00
Richmond	1,300	23 61
Norfolk	1,300	17 35
Fort Wayne	1,419	12 57
Washington, D. C.	2,190	66 57

No Substantial Difference in Conditions Between Washington and Other Cities to Affect Expense of Maintenance.

We submit that since the business of telephony should naturally cost about the same in different cities of about the same size, the burden should be on defendant to point out differences to account for an annual cost of $66.57 per exchange station in Washington as against $25.26 in Toronto, $20.95 in Detroit, and $18 in Grand Rapids. Great stress is laid on the alleged **difference in length of lines.** In considering maintenance cost this means only a proportionate increase of repairs of wire and conduit, since it can not affect the exchange expense, or subscriber's stations expense, both of which will be the same with a long line as with a short line, or nearly so. This excess cost of maintenance is so slight as to be hardly appreciable in the underground parts of the plant, and does not exceed a very small percentage in the overhead, but in no view can it explain the disproportion in the figures of annual expense above given.

In Washington it is testified that the average distance of stations from the exchange (including Georgetown, but excluding the long suburban lines) (Rec, pp. 1074–5), is "about a mile and a half" (Crenshaw, Rec., p. 1083), though it would seem that Mr. Crenshaw, in making this estimate, could not have taken into account the department switchboard telephones, the average lines of which must be less than one-eighth of a mile, and would so reduce his speculative average as to bring it within the maximum distance fixed by Colonel Tompkins, who says (Rec., p. 51) that in sixteen cities he found the *maximum* length of lines to be one mile. If we allow 75 telephones for the suburban lines, we have about 2,050 city telephones, having a total distance of 2,925 miles. In Toronto the average distance is four-fifths of a

mile, a total for 5,932 telephones of 4,449 miles. In 1898 Toronto maintained its entire plant (franchise tax and depreciation not included) for $148,815.31, while it is alleged it cost Washington at the rate of $159,912.52 for the same year (Rec., p. 348). That is, Toronto maintained *an excess over Washington* of 1,524 miles of traffic lines and 2,956 telephone stations at a *cost of $11,097.21 less than Washington.*

The Washington Superintendent of Equipment calculates the cost of "inspection" at "between ten dollars and twelve dollars" per telephone (Rec., p. 1108); at $11 the cost to Toronto for this item was $29,564 in excess of the cost of the same item to Washington. If we add to this the actual difference in "operating" expense of $34,406.63 (compare Rec., pp. 79 and 999) and the taxes, $1,531 (Rec., p. 999), and deduct the aggregate from the total expense for Toronto, we find that Toronto maintained an equal number of telephones with Washington, and *more than 1,500 miles of traffic lines more than Washington, for $76,598 less than the cost at Washington.*

Detroit makes a similar showing: During 1898 the Detroit Telephone Company had an average of 4,636 stations (Rec., p. 451) averaging in distance from the exchange three-quarters of a mile; a total distance of 3,477 miles. The total expense of every nature was $97,097.92 (Rec., p. 460). That company, therefore, maintained 2,636 more telephones and 552 more miles of traffic lines than Washington, and spent $62,814.60 less than Washington.

In Grand Rapids the average length of lines is three-quarters of a mile. The average number of telephones in 1898 was 2,362, and the total mileage 1,771, as against 2,126 lines in Washington with 2,925 miles. The total expense at Grand Rapids was $37,000 (Rec., p. 483), as against $159,912 in Washington. Will it be claimed that this difference was due in any great part to the cost of maintenance by the Washington company of its extra mileage?

Wages—The difference in cost is not found in this item. Though Washington rates are higher the real difference is slight. In the operating department it is very slight. The Washington payroll of September 30, 1898 (Rec., p. 79), shows one chief operator at $100 per month, and 36 operators at an average of $25.15 per month. In Toronto there were 156 operators (Rec., p. 969) whose pay averaged $20.25 each (Rec., p. 962). Washington, therefore, in 1898 paid its 36 operators $2,234.40 more than Toronto paid for a like number.

Of linemen Washington had 22 at an average rate of $50 per month. Toronto had 38 and paid an average of $43. This difference amounts for the 22 to $1,848 in the year.

Of "helpers," Washington had 26, at an average rate of $39.12. Toronto paid $30. Annual difference, $2,845.

Of "inspectors" and "instrument men" Washington had 14, with greatly varying salaries (Rec., p. 79), so that no rate can be stated. In Toronto they paid $38 per month, and employed 22 men (Rec., p. 973). The difference in rates then for the two important classes of workmen in the operating room and the outside force was at the maximum for the number employed by Washington, in September, 1898, only $6,927.40 per year.

Certain Increase of Business With Lower Rates.

In determining this question of the validity of the statute fixing rates, we have the right to consider the probable increase of business at the lower rates, for all experience suggests the probability that a reduction of rates will increase the amount of business, and therefore the earnings.

> Smyth *vs.* Ames, 169 U. S. 547.
> Chicago *vs.* Wellman, 143 U. S. 339.

Washington with its high rates has 2,132 exchange and 485 private lines, a total of 2,617 stations, to serve 288,000 people, or one station to each 110 people.

Grand Rapids has one to every 25 of its 100,000 people.
Toronto 1 to every 34 of its 200,000 people (Rec., p. 975).
Montreal 1 to every 34½ of its 250,000.
Detroit 1 to every 28 of its 250,000.
Fort Wayne 1 to every 20 of its 50,000.
Stockholm 1 to every 17 of its 280,000 (Rec., p. 858).

It is also clear that the tendency among telephone users is to the metallic circuit lines to serve only one subscriber (Rec., p. 243), and that should the statute be obeyed, nearly all telephones would yield the highest rate allowed thereby.

Should the statute be obeyed we might confidently expect Washington to employ one telephone to each 40 of its people or 7,200 telephones.

Alleged Increase of Cost per Telephone with Increase of Subscribers.

The suggestion made by complainants that Washington will, at the statutory rates, readily absorb several thousand more telephones than are now in use, and that this will result in increased profit to the telephone company, and enable it readily to do business at these rates, is met by the claim that with the admitted probable increase will come an increase in the cost of service of each telephone. This extraordinary claim, which thus distinguishes this business from every other, and makes the proprietor thereof poorer with each increase in the volume of trade, demands extraordinary proof, and it is not found in this case.

Several witnesses assert their belief in the doctrine, but not one proves it. Complainant's claim is that the proportionate cost of *maintaining the plant must decrease* with an increase of subscribers, while the disproportionate increase, if any, in the operating department, is of so little consequence as to be worthy of but little notice.

It is interesting to note that nearly every witness limits the supposed disproportionate increase of cost to *the operat-*

ing room. This is where Mr. Samuel M. Bryan leaves it (Rec., p. 39). Mr. Maynard dogmatically asserts (Rec., p. 404) that the cost will increase, but on cross-examination finds the increase in the operating room and in the cost of construction of an improved plant (Rec., p. 413, *et seq.*). Mr. Farnham can itemize only the expenses of the operating room, and the more frequent repairs of the subscribers' instruments growing out of the supposed increase in use (?) (Rec., p. 291).

All the witnesses dwell with emphasis on the increased cost of *switchboards and other items of construction*, but such items do not properly enter into the consideration of the question of maintenance. The supposed testimony of Mr. Preece, found in the document put in evidence by defendant (Rec., p. 299), supports our view. He declares the increase of cost of *maintaining* the apparatus and lines to be probably proportionate to the increase of subscribers, but on the false theory that the increase of calls per subscriber will increase as the square of the increase of subscribers (Rec., p. 299), asserts his belief that the larger plant will cost more per instrument. If this *theory* is not supported by the facts of experience it must fail.

Alleged Increase of Calls Per Subscriber with Increase of Subscribers.

One of the deceptive and fallacious propositions persistently advanced by telephone companies, is that the cost of operating exchanges is greatly increased with an increase of subscribers because of the (alleged) great increase of calls which each subscriber will make.

To illustrate this, a table is compiled showing the "possible combinations" with different numbers of subscribers to be:

With 100 subscribers.....	9,900 combinations
With 1,000 subscribers.....	999,000 combinations

With 1,500 subscribers	2,248,500 combinations
With 2,000 subscribers	3,998,000 combinations
With 5,000 subscribers	24,995,000 combinations
With 6,000 subscribers	35,994,000 combinations
With 7,000 subscribers	48,993,000 combinations
With 9,000 subscribers	80,991,000 combinations

Perhaps the best proof that this ingenious mathematical statement has no value in practice, is found in the fact that although more that 3,998,000 calls might be made daily in the Washington office, less than 28,000 are in fact made.

The extent to which belief that the actual increase in calls will nearly agree in proportion with the figures of this table has been drilled into the minds of telephone employees, and to what absurdities it brings them, is shown by the testimony of the witnesses Annie A. Prosperi (Rec., p. 398) and Minnie E. Richardson (Rec., p. 401). The first testified that if, with 2,000 subscribers, the average of daily calls was ten, with 4,000 subscribers the average would be twenty, with 6,000 subscribers the average would be thirty, with 8,000 subscribers the average would be forty, with 10,000 subscribers the average would be fifty.

Miss Richardson unhesitatingly declared "if the number of subscribers doubles the subscribers' calls would double" (Rec., p. 399). "They have access to so many more people when the subscribers increase" (Rec., p. 400). And she in terms (Rec., p. 401) supported Miss Prosperi in the figures of increase as above given.

So also the chief of the operating room, Mr. Nevius, declared his fixed belief that if there are 10 calls per subscriber with 2,200 subscribers, there might be reasonably expected, with 4,500 subscribers, an average of 24 calls (Rec., p. 233), with 6,600 subscribers an average of 30 calls (Rec., p. 231, as to effect of party lines), with 8,000 subscribers an average of 36 calls, with 8,800 subscribers an

average of 40 calls, and that with 8,800 subscribers each operator could care for 25 lines only (Rec, p. 261).

With a little more reserve in expression, the witness Farnham endeavored to convey the same impression, saying (Rec., p. 291):

> "It has been found in many exchanges that *within fairly known figures* when the number of subscribers doubles the use of the telephone per subscriber in a given time also doubles."

And it is by this theory that he figures out that upon doubling the number of subscribers a switchboard must be increased in size *eight times* (Rec., p. 292), thereby causing great outlays. This same theory of great increase in the average number of calls per subscriber is advanced by other witnesses for the defendant with more or less of confidence, and is shared by some of the witnesses for the complainants. Like most unsound theories, this has a basis of truth, but as put forward by the defendant is absolutely disproved by the testimony in the cause, which establishes that just as soon as the active business element of any city is fairly supplied with telephones the average number of calls *decreases* with the increase in number; this for the reason that the first subscribers are always those having the greatest need of the service, and likely to most frequently employ it, while the later subscriptions are for residences or for smaller places of business, where the use of the lines is inconsiderable. This is shown by every case in evidence:

City.	Telephones.	Average calls.	Lines per oper.
London, Can	1,124		124
Richmond, Va	1,300		100
Norfolk, Va	1,300		90
Washington, D. C	2,100	10	100
Grand Rapids (Bell Co.)	1,500	9	
" " (Independent)	2,500	10	83

Detroit (Bell Co.)	4,200	12	83
Toronto	5,900	13.8	103½
Montreal	7,200	12.6	111
Brooklyn	8,500	11 or 12	65 to 100
New York	9,000	10.8	67.4
" "	31,000	10	61.2
Christiania, Norway	4,624	9	100
Stockholm, Sweden	11,536	10	100

It is also shown that in perhaps the busiest exchange district in the world (Bethel, Rec., p. 1118), that of the Broad Street Exchange in New York, with 1,855 subscribers, the average daily number of calls per subscriber was only 13.7. So Mr. Bethel testifies that he learned that over the 9,000 or 10,000 flat-rate lines in use in Stockholm, having connection with 16,700 or more subscribers, the average of daily calls was "about 13 or 14" (Bethel, Rec., p. 1136). So far as the proof shows, *there is no city in the world in which the average number of calls per day per subscriber exceeds* 13.8. What credit, then, can be attached to the beliefs and opinions and judgments of the witnesses for defendant to sustain the fundamental theory of this defense, opposed as they are by these facts?

Even the testimony of the Boston expert, Farnham, discredits this fallacious theory. Mr. Farnham, in his testimony in chief and for the purpose of establishing this theory, takes the principal business exchange in Boston and compares certain years, as follows (Rec., p. 292):

Years.	Subscribers.	Daily Av'ge Calls.
1885	1,804	7.6
1888	2,466	10.
1889	2,765	10.
1891	3,240	12.
1895	3,319	15.
1897	4,064	17.

But this exchange is in the heart of the city, and while it is true that *the number of telephones in that one exchange* has increased from 1,804 to 4,064, or a little more than double, yet the number of subscribers with whom they had in 1897 direct exchange connection, was 12,000 (Rec., p. 314). The witness did not give the average number of calls among these 12,000, or even among the 8,000 or 9,000 in the city of Boston proper (Rec., p. 313), although he admitted that the average would be greatly reduced by the residence districts (Rec., p. 315). He also admitted that he had not informed himself of the average in the residence district (Rec., p. 315). Since he could not give the number of exchange subscribers in Boston (except in one office) in any year from 1885 to 1897, (Rec., p. 316), his testimony is not supported by any figures of the slightest value.

There is nothing in his testimony inconsistent with the surmise that in 1885 there were no more than 2,500 exchange subscribers, where there are now 12,000. There are now five exchanges, where there were then but two.

The witness Maynard was also relied upon to support the theory, and testified, from his recollections of experiences more than seventeen years before, that—

> "We found that as the exchange was enlarged, the increase in the amount of the service was about in proportion to the square of the number of subscribers in the normal conditions of business."

That he also was repeating, parrot-like, the shibboleth of the American Bell Telephone Company, and was without data on which to make an estimate of this nature which could be of the least value in this case, is shown by his answers on cross-examination, when he declared that he did not know how many subscribers he had had, or the capacity of his switchboards, or the number of operators employed, or the number of daily calls per subscriber at any time, or the extent of increase in the business, or the rates charged (Rec., pp. 408–9); had not seen any memoranda on the

subject since 1881 (Rec., pp. 411); had not gathered any *statistics on the subject* (Rec., p. 412), and could not tell when or where he had seen any such statistics.

Mr. Sargent, an expert witness for the defense, whose knowledge is confined (Rec., p. 575) to the territory covered by his company, to-wit, Brooklyn, Newark, Jersey City and other New Jersey cities (Rec., p. 570), stated the average calls per subscriber in Brooklyn, both on measured service and unlimited service lines to be six, and the average *among the unlimited service* to be eleven or twelve (Rec., p. 581).

A striking illustration of the falsity of this theory in actual practice is found in the experience of the defendant company, which, as shown by the tables on pages 72 and 153, had in 1884, 19 operators to 954 telephones, or one operator to 50 telephones, and in 1898, 35 operators and 2,106 telephones, or one operator to 60 telephones.

But if all this were not enough to satisfy the most skeptical that the claim that increased cost per subscriber comes with an increase of stations, is fallacious, we point to the proved experience at Toronto for the years 1895, 1897, 1898, which shows an increase in subscribers in each year and a decrease of expense per station in each year. The defendant has not produced evidence of a single case, authenticated by figures, to offset these Toronto results.

Operator's Wages as Against Increase of Subscribers.

It is in evidence that the average pay of operators is $5.91 per week, equal to $307.32 per annum, while the average receipts per telephone were $106 (Haskins' Exhibit). The much to be dreaded increase of subscribers has in the past affected these two items as follows:

In 1884 there were 954 telephones and in 1898 there were 2,106 telephones (Rec., p. 165), an increase of 1,152, earning, at $106 each, an increase in rentals of $122,112.

In 1884 there were 19 operators and in 1898 35 opera-

tors (Rec., p. 166), being an increase of 16 operators, earning $9,456 (Rec., p. 73).

Between 1892 and 1898 there was an increase of 384 telephones, earning $40,704, and an increase of six operators, costing $1,843.92 (Rec., p. 166).

Again, operators' wages have been but a small item in the expense account of this company, being less than 7 per cent of the gross receipts during the six years ending with 1897 (Haskins' tables).

Instead of theories propounded by girls and young men, inexperienced except in the actual work of responding to calls for telephone connections, the court was entitled to have, *and the defendant might have produced*, the records and accounts of telephone companies in other cities of the United States, showing particularly the expense per telephone of the business in those cities. These records and accounts have been studiously kept out of the case, and the witnesses confined to repetition of the theories made plausible through mathematical tables worked out by ingenious electricians. Not one witness is produced to show that the theoretical results of these tables have ever been verified in actual practice, while a mountain of proof discredits them. In the only case where the defendant does produce figures from actual workings over a series of years, (Toronto), the results are destructive to every theory on which defendant has rested its case, and most strongly support the contention of the plaintiffs. The proofs do not answer the questions:—if excellent telephone service is given in Toronto at an annual expense to the telephone company of $25.26, why may it not be given here at that sum? If, at rates never exceeding $50, the Bell Telephone Company of Canada has for years paid 8 per cent dividends on its capital stock, and has amassed $800,000 of reserve fund, why is it that the Chesapeake and Potomac Telephone Company can not live and pay dividends at like rates?

Upon all the evidence in the case we submit that the

following would be a fair statement of probable annual net results as between the appellant and company, taking the figures of the Haskins' Exhibits (with proper deductions) for the six years ended December 31, 1897, as the basis for calculating expenses, and assuming that the number of telephones in use would not increase:

Average annual expense as per Exhibit D		$128,418 16
Less rentals and royalties	$19,822 67	
Less interest on bonds	8,000 00	
Less deposits to sinking fund	6,666 67	
Less traveling expenses	3,159 98	
Less construction mischarged to expense	19,039 35	
Less expense of maintaining excess plant, say 2 per cent on $200,000	4,000 00	
Less reduction of salaries, say $6 per station	10,941 00	
		$71,830 67
Receipts over expenses		$56,687 49

As shown, the reasonable value of the entire plant necessary to, and in use for the average number of telephones in service, was, upon a generous estimate, not in excess of $300,000. Surely this balance of more than $56,600, or even the third thereof, would afford that "fair return upon the reasonable value of the property at the time it is being used for the public," which this court has said is all that the public service corporation may demand.

San Diego *vs.* National City, 174 U. S. 757.

We are called upon to go no farther than to ask the court to find that the appellant has failed to demonstrate beyond a reasonable doubt that the statute rates are so low as to amount to a taking of its property without just compensa-

tion. We submit that not only does the proof not show the rates too low, but affirmatively establishes that they are in excess of what is necessary to the payment of all expenses of maintaining and operating the plant, and the return of fair dividends to those who hold its bonds and stock.

The decree of the Court of Appeals should be affirmed.

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No. 363.
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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, APPELLANT,

vs.

J. F. MANNING AND COMPANY, APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES

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SUPPLEMENTAL BRIEF FOR APPELLEES

As stated in our first brief, we had not at the time of its preparation a brief from counsel for appellant. In view of some of the statements contained in their brief (which has only today, March 5) reached us, we feel we should file a further statement and bring together some of the testimony to sustain our statements of fact.

1. What is the value of appellant's property, actually and neccessarily used in its business of selling telephone service?

The appellant claims its plant has cost $541,254.12, and this much has been charged to "construction," and that to replace it would cost $427,999.79 (Rec., p. 383, 391), and presumably will claim it should have a reasonable compensation upon one of these amounts. We insist that this should not be allowed because *only part of this plant was ever in use*, it having been built much larger than was necessary.

This is certainly true of the most expensive part of the plant, that is, the trench subways. In the report of the president to stockholders, made January 31, 1898, and showing extent of the plant, appears the following (Rec., p. 281):

> "Total of trench subway, 79,752 feet, 9½ inches, containing 697,896 feet, 7 inches of duct, of which 234,174 feet is occupied by cables. . . . There is provision for 56-100 pair cables to enter exchange. There are 23-100 pair cables entering exchange at present, containing 4,600 wires, of which 2,600 are in use."

A computation will show that if 2,600 wires sufficed to serve the 1,308 grounded circuit and the 836 metallic circuit stations then in use (Rec., p. 285–6), the duct system was large enough to supply 11,335 stations divided in the same proportion between grounded and metallic circuit lines.

This excess of system is explained by the superintendent of construction in these words (Rec., p. 1067):

> "In making the plans for an underground system we always look ahead, and *put in as many ducts as we think will be required in the next twenty or thirty years*, allowing in all cases for a certain percentage of the conduit that will probably always remain unused," etc.

Mr. Dunbar, an expert electrical engineer, testified (Rec. p. 677), that the underground system of appellant "is far in excess of the duct mileage required for 2,200 subscribers' stations in Washington," and that the capacity would be sufficient for over 13,000 subscribers upon metallic circuits of an average length of one mile.

This underground system is valued by appellant's engineer at $146,920.96. Only a fraction of it should enter into a calculation of the value of plant actually and necessarily in use by the 1,856 subscribers on December 31, 1897.

2. Deductions to be made from the accountants' claim of annual cost per telephone.

We do not question the ability of Mr. Haskins, or of Mr. Tompkins, as accountants, and their good intentions. Our claim is that each of them utterly failed to distinguish between that kind of accounting which is proper between a corporation and its stockholders, and that which is proper between a corporation *and the public*. The liability of the public to the public service corporation may be stated as at most a liability to pay to it its necessary expenses of performing the service, plus some return upon the money invested in the plant actually and necessarily employed for the public. This view of the public liability entitles us to question the items which the corporation puts in its statement of expense, and to ask that the court determine if those items are properly there. In this view we examined the witnesses who produced these accounts, and it is upon the testimony we ask, as in our first brief, the exclusion of the items there stated from the charges to maintenance as found in Haskins' tables.

Expenditures properly chargeable to construction charged to maintenance.

The largest item claimed as a proper deduction from the charge to maintenance is $114,236.15, the cost of laying terra cotta conduits from 1894 to 1897, both inclusive, to take the place of other uderground construction known as the solid system, sufficiently described in appellant's brief. We are surprised to find the statement in appellant's brief that "only $21,398.35 of this sum of $114.236.15 was charged to maintenance." The fact is that the charge of $21,398.35 was that part of the whole sum which in 1897 was charged to maintenance. We refer to the record to show the facts concerning this.

To explain why one system was substituted for the other, the witness Crenshaw testified as follows (Rec., p. 184):

> "Q. What was the reason for the change from the system which you have last described to the system now in vogue. A. There were several reasons. One is that the new system is much cheaper per duct. Another reason is that with the drawing-in system you can add your cables when you want them. You do not have to place more cable in the beginning. Another reason is that if a cable pulls out or deteriorates in any way, if any section of it becomes useless, it can be tested at the manhole, the point of injury found, drawn out and a new cable drawn in; whereas, with the solid syetem, the street would have to be torn up in a large number of places, first, to locate the trouble and then to repair it. Q. What became of the cables that were placed in the ground under this solid system? A. They were abandoned and left in the ground."

Again, the witness was asked (Rec., p. 190):

> "Q. Please state what those rules are? How do you determine what shall be charged to maintenance and what shall be charged to construction? A. Charges to construction are in connection with work that *adds to the plant of the company without having replaced former plant*, or anything that the company at that time had. Q. *Do I understand that everything else is charged to maintenance?* A. *Yes, sir.* Q. Explain more fully what you mean by replacing existing work and charging it to maintenance. A. If this company had what we call the old solid system cables in a certain section of the city, and replaced it with the new drawing-in system, if the expense of the new system did not exceed the cost of the old system it was charged to maintenance."

And again (Rec., p. 193):

> "Q. And has that plan been pursued in recent years? A. It depends upon the amount of solid system abandoned, and the amount of new work

constructed to take its place. *Where the cost of the new work did not exceed the original cost of the old work, it was all charged to maintenance.* Where it did exceed it, the excess was charged to construction. Q. So I understood from your answer in chief, and I construed your last answer to be opposed to that. *Where the cable capacity of the conduit was increased but the cost did not exceed the original cost of the solid system, did you charge any part of the new work to construction? A. I did not.*"

And again (Rec., p. 200):

"Q. You stated the cost of the solid conduits, including certain repairs. What repairs are those? A. I made the statement that the solid system including certain improvements, amounted to $114,236.15. To go more into detail, I will explain that of that amount $95,224.05 were spent and charged to construction, covering brand new work; $18,000.00 of this was spent in improving the form of conduit from that originally laid so as to make it a better conduit and was charged to reconstruction."

Mr. Crenshaw, at page 201, again states the amount charged to maintenance in 1897, as $21,3?8.85, but it is not found anywhere that his statement of the systematic method of the company was not carried out as stated by him. He further shows (Rec., p. 202) that the solid system was laid between the years 1884 and 1888; that its abanment; for the drawing-in system was commenced in 1894, and terminated in 1897. This division of the entire cost of the solid system thus charged to maintenance in those years was made only for convenience in the investigation of the maintenance charge for 1897.

The references in appellant's brief to pages 354 and 355 do not sustain the claim that Mr. Crenshaw was mistaken in his positive statements that the rule of the company had been adhered to in the instance in question. All that Mr. Haskins says, is, that, in his opinion, the company should

have charged more to maintenance than it did charge. It is to be borne in mind that *all the additions* to the plant of the company which might fall within our criticism as having been improperly charged to maintenance are not stated anywhere in the testimony. What Mr. Haskins says is this (Rec., p. 353):

> "The rule governing the construction department in making their charges was that the cost of the new work in excess of the value of the old work abandoned or taken up should be charged to construction, and it is evident that it is intended in their account to follow that rule, but this statement which is rendered for construction shows that they had not followed strictly that rule. Q. In what respect have they departed from it? A. By not making a credit to construction account and charging the expense account with the value of the old material, or old plant taken up or abandoned, such as cables torn out and abandoned and asphalt conduit abandoned."

Being then asked—

> "What has been the result of that as to how the construction account stands *upon the books of the company*,"

he answers that they did not place on the books enough to maintenance by $57,053.23.

Mr. Haskins, as an accountant, corrected the errors in bookkeeping which he found, and presented what he considered an accurate statement, and thus carrying his theory into his accounts, of course charged up the $114,236.15 to maintenance.

The company in 1895 abandoned 2,197 feet of asphalt conduit and 21,325 feet of underground cable, and in 1896, of asphalt conduit 15,235 feet, and of cable 57,428 feet (table, Rec., p. 67). The 9,045 feet of conduit and cable abandoned in 1897 cost $28,226.40 (Rec., p. 201). At this rate the work abandoned for new construction in 1895 cost

$6,854.65 plus the cost of 12,280 feet of cable (cost not known), while only $544.14 was charged to construction. The work abandoned for new construction in 1896 cost $47,533.20 plus the cost of 48,383 feet of cable (not known), while only $2.25 was in that year charged to conduit construction, and $5,366.72 to cable construction (Rec., p. 69).

That new work was done in both years is shown not only by Mr. Crenshaw's testimony, but by the tables on pages 66 and 67. These tables show of underground work in 1895, 1,072.2 feet of conduit and 6,254 feet of cable drawn in, and in 1896, 1,000 feet 9 inches of conduit and 35,674 feet of cable drawn in.

If counsel can show how 1,000 feet of conduit may be built for $2.25, they may have ground for contention that some other than the regular rule of the company was employed in these years.

Increase of Capacity Not Considered.

The annual report of the company for 1897 shows the increase of cable capacity in the ducts for that year to be 51,134 feet, none of which was charged to expense. This is right according to Mr. Haskins' theory of bookkeeping as appears on page 357 of the record.

> "Q. Then, Mr. Haskins, although you should find that *the increase in capacity for service in that year was from one-seventh to one-fourth of the whole plant of the company, you would consider it proper that none of that should be carried to construction*, provided the cost of it was not in excess of the cost of work which was abandoned? A. *I should say so; yes, sir.* Q. Although that abandoned work was of inferior capacity? A. I should say so. Q. That it would not serve so many customers? A. I should think it ought not to be carried to construction."

We are aware that the question of what items should be charged against revenues as cost of maintenance, was before

the court at the last term in *Cotting* v. *Kansas City Stock Yards Company, 183 U. S.*, decided at this term. There was cited to the court in that case Greene on Corporation Finance (1897, pp. 83–114), where the author, dealing only with the *accounts of the corporation with its stockholders* lays down a rule directly opposed to that stated by Mr. Haskins, as follows:

> "To those who wish a working principle to distinguish the proper items to be charged to capital account in the actual mangement of American corporations, railway and other, the following definition is suggested: No additions to the property either to the real estate or to the machinery (if a manufacturing company), or to the roadbed and track (if a railway company), should be considered betterments and charged to capital, *unless they increase the productivity or earning capacity of the plant.* Under this rule the purchase of additional equipment for a railway would be an expenditure which could conservatively be met by the issue of bonds or equipment notes, *because such purchases would enable a larger volume of traffic to be handled*; on the other hand, the replacement of a wooden bridge by an iron one would not be a proper charge to capital, under our definition, *unless it was one of a series of expenditures deliberately resolved upon in order that heavier trains could be run and a larger volume of traffic handled,* thus increasing the revenues of the company—an increase which our theory demands should be clearly seen to be possible after the various amounts of capital set aside for this purpose had been spent. The same rule might be applied to corporations other than railways; the safe course is to charge against revenues (possibly through the profit and loss account) the cost of all additions to the property *which do not increase the output* or decrease the cost of production."

Rentals and Royalties.

These should not be calculated in determining the necessary expense for telephone service. They are paid to the

American Bell Telephone Company, which owns $1,507-600 of appellant's capital stock of $2,650,000 (Rec. p. 164), and has two direct representatives (its president and its general manager), upon the directory of the appellant (Rec., p. 162). These rentals are paid under agreements made in 1883 and 1885 (Rec., pp. 31, 39), which reserve to the American Bell Telephone Company the property in the telephone and the right to fix "the terms, conditions and rentals" to subscribers (Rec., pp. 31, 34). The rental is to commence on each instrument—

> "on the first day of the second month after the shipment by the lessor, to continue until the instrument shall be put in possession of the licensor or proved to be destroyed" (Rec., p. 38).

The rental paid is $7.50 per year for each receiver and transmitter; the average life of the instrument is stated to be for ten years. The American Bell Telephone Company thus obtains for its receiver and transmitter in its telephone at least $75. Instruments far superior to its telephones used on its grounded circuits may be readily purchased for less than $10, and instruments equal to its best may be bought complete for $16, while those equally good for exchange purposes and eight-tenths as good for long distance uses as its best may be bought for $14 (Rec., p. 509).

Counsel for appellant say that this rental is paid not alone for the instrument furnished, but as compensation for the use of the patents relating to telephone service which were or which might at any time come under the control of the Bell Company, and for the right to use long distance connections.

It is to be noticed that there is no evidence whatever of any patent for telephones controlled by the Bell Company issued later than those described in the contracts in evidence, that is, March 7, 1876, and January 30, 1877 (Rec., p. 29). The latter date being twenty-one years before this statute,

the patents had expired. The type of instrument used at 1,308 of the 2,144 subscribers' stations on December 31, 1897 was antiquated, and no longer manufactured by up-to-date manufacturers (Rec., p. 768). So far as appears, then, there was no reason why this company should not have given this practice of paying rentals of $7.50 per annum for parts of its telephones, and bought better at $11 from the Western Telephone Construction Company (Rec., p. 621, *et seq.*) or some other manufacturer. The president of the company named, testified that the long distance telephones manufactured by it, and sold complete and ready for use for $11, has proved itself equal for telephonic service in such a city as Washiington, D. C., to the first-class long distance Bell telephones used for like purposes (Rec., p. 622). The auxiliary desk outfit sells at from $8 to $10 (Rec., p. 622).

It would seem certain that the appellant has been wholly controlled in this expenditure by the American Bell Telephone Company, its largest stockholder, which is not content to receive investors' profits during the life of its patents, but demands that the public shall always pay them.

The argument that the subscriber on the Bell system should be required to pay this rental tax because of his right to have long distance connections is equally unsound. None of the subscribers had any greater or less right to use the long distance lines than any of the public; all must pay precisely the same toll, no difference being made in favor of subscribers, and the 1,308 Blake transmitter instruments were wholly unfitted for long distance use. For the long distance instruments a much greater annual payment was demanded, presumably in part for the convenience for which counsel now ingeniously suggest the rentals were paid. This item is not inconsiderable, amounting, in the six years ended December 31, 1897, to $96,350.26 for exchange lines and $12,730 60 for private lines, or $109,080.86 in all (Rec., p. 1163).

As to the royalties for switchboard drops, which amounted

to $9,855.16 in the six years (Rec., p. 1163), much of our argument as to rentals holds good. It is not necessary to pay royalties on switchboards, for they may be purchased outright, and such purchase price should be charged to capital.

In New York several types of switchboard are used, the multiple, the standard, and the divided being all in use (Rec., p. 1149). It is pleaded by counsel that the appellant is bound by its contracts to pay these rentals, and that if it should refuse to do so, and be sued, it could not plead the act of Congress as a defense. We grant the contention. This appellant made a similar contention in Maryland to the petition for mandamus brought by the Baltimore and Ohio Telephone Company to compel telephone service. The court held the plea bad (66 Md. 399).

Surely the public are not bound to pay unreasonable rates because this company has contracted with the holder of three-fifths of its stock to pay it exorbitant prices. It should dispense with the switchboard, buy one for which it will pay no royalties, and then charge the public interest on its cost.

Traveling Expenses.

Mr. Haskins, in his tables of expense, includes two items of $9,119.41 and $9,840.45, respectively, for "traveling" expenses. No explanation was given whatever by appellant, whose duty it was to justify its claims of expense.

The attempted explanation by counsel is wholly imaginative. We take it that no bookkeeper would charge street car fares or buggy hire to "traveling."

If it applies, as they suggest it may, to the traveling to Baltimore or elsewhere over the company's territory to inspect other plants, it has no place as a part of the necessary expense in conducting the Washington exchange.

Interest and Sinking Fund.

Mr. Haskins, whose expert bookkeeping and methods are so highly lauded by counsel, also charged the public with the annual interest account of the appellant to the amount of $56,333.40 for the six years in question, and with $40,000 deposited with the sinking fund trustees to meet the requirements of a mortgage (Rec., p. 1162). As to the interest item, we have already shown that Mr. Haskins admits there is nothing to show that any part of the proceeds of the bonds on which this interest is earned was spent in Washington (Rec., p. 49).

Such an item was rejected by this court.

Union Pacific RR. Co. *vs.* United States, 99 U. S. 420.

To charge the public with the $40,000 deposited to the sinking fund is absurd, since it remains an interest producing asset of the company.

That he did so charge this item reflects on Mr. Haskins' intelligence, and broadly illustrates his obtuseness in stating accounts as between a public service corporation and the public. If these items of interest charges, deposit to sinking fund, instrument rental, switchboard royalty, and the cost of conduits wrongfully charged to maintenance, be deducted from Haskins' statement of expense during the six years in question, the average annual expense of telephone was but $34.56 as shown by the table on our first brief, pp. 33, *et seq.* If the other item of "traveling" be deducted, the average annual expense was much less.

The tables of appellant's counsel (Brief, p. 122), showing the supposed results upon striking out controverted items from Mr. Haskins' tables, are erroneous in that they ignore the improper charges to maintenance and include interest on the value of the entire plant, ignoring the fact that only part of it is in use, as already pointed out.

The statement on the same brief (p. 134), that the tables

on pages 69 to 71 show the amounts "paid for and charged to construction" is misleading. It shows the amounts charged to construction. It does not show the amounts actually paid for construction but charged to maintenance.

Another misleading table is in the record at pages 136, 137, where Mr. Bryan, president of the company, shows that, with the number of telephones in use at the passage of the act, the revenues would be $91,115.

This statement is erroneous in two particulars at least:

a. It wilfully places in the $25 class telephones for which $50 might be charged.

b. It omits 132 exchange and 490 private telephones then in use.

c. It ignores many items of revenue.

Upon looking at the list made up by Mr. Bryan, dated June 30, 1898, it will be seen he shows 18 grounded circuit and 207 metallic switchboard station telephones, all of which he places in the "four on a wire" class.

These instruments all belong in the class for which $50 is chargeable. A "switchboard station" is nothing more nor less than a small exchange, similar in all respects to the "Central," "East" and "West" with which we are familiar. In this city they are set up in the Departmental buildings of the Government, where constant intercommunication takes place. Operators at these switchboards perform similar duties to those at Central, and, upon request connect subscribers with subscribers either in or out of the particular building (see list, Rec., p. 267). It is as much error to claim that the 48 telephones connected with the House of Representatives' switchboard (Rec., p. 274) are all on one wire as it would be to claim that all telephones served by "East" are on one wire because a single wire or trunk line connects "East" with "Main." This change to $50 for these 225 stations would add $5,625 to Mr. Bryan's statement.

His estimate shows a total, on June 30, of 2,003 stations;

Mr. Haskins finds on the next day 2,135 exchange, and 490 private line stations (Rec., p. 350). Mr. Bryan omitted, therefore, from his count 132 exchange and 490 private telephones. These would yield, at his average of $45.31 per telephone, $5,530.92 plus $21,601.90, or $27,132.82.

Mr. Bryan's third error, the omission of many items of revenue shown to be actually enjoyed by the company, appears by Haskins' statement for part of 1898 (Rec., p. 344). If we accept Mr. Bryan's statement that the average receipts would be $45.31 per telephone, Mr. Haskins' statement of revenue would show more than $54,000 more than Mr. Bryan calculates. Comment is unnecessary.

Depreciation.

Appellant claims that to the ordinary expense there must be added an allowance for depreciation and for extraordinary expense, "caused by storms, fires, damage suits, and other contingencies."

In the six years' statement by Haskins all extraordinary expense caused by storms, fires, damage suits and other contingencies have been taken into account, and their allowance has not been questioned by the appellant. It can not be assumed that they will be greater in the future than in the past; hence, if the annual expense is to be ascertained by these tables, the appellant can not properly ask a further allowance for these items than has been already made.

As to the claim for depreciation: This term in telephone parlance has not the meaning which would be attached to it in connection with a railroad or stock yard plant, or other establishment of that kind. It is defined by the secretary-treasurer of the Bell Telephone Company of Canada, a witness for the appellant, as follows (Rec., p. 1000):

> "Q. Will you explain what it is that is covered by depreciation which it is not taken care of by the two items referred to for maintenance proper? A.

> Constant changes are taking place in the telephone business. When a telephone exchange has grown to a certain extent, the previous plant has to be gotten rid of and a new plant put up. A certain system of switchboards is not sufficient for the requirements of the larger office. They have to be taken out and thrown away and a new system introduced. These are things that can not be looked after year by year, but only at stated periods in the history of a telephone exchange, when a complete change has to be made, and the money has to be provided to make the change. What you find in our regular payrolls for maintenance is simply general repairs to the system as it is then running. Beyond that there *is a new construction* that has to be done for an *entire change of system*—small poles taken down and big poles put up in their places, and finally big poles taken down altogether and underground work put in; and that, in our experience between 1880 and 1895, required an annual setting aside of ten per cent."

From this it appears that the term means *additions to plant made necessary by increased business*, and not deterioration, or diminished value, as in the case of railroads, stockyards and the like. In telephone accounts "maintenance" takes care of all repairs and the plant is kept always at its best. The appellant would charge the public with all repairs, and with all additions to plant. It cannot be that this is right. Such an item was rejected by this court in *U. S.* v. *Kansas Pacific Railway Company, 99 U. S. 455*, when the effort was to ascertain "net earnings," saying:

> "First: Depreciation account, or expense not charged up. This is explained to be the amount necessary to put the road in proper repair, but which was not actually expended for that purpose. We are clearly of opinion that it is not a proper charge. Only such expenditures as are actually made can with any propriety be claimed as a deduction from earnings."

In reviewing the claims and accounts of the appellant we have preferred to deal with its showing for the six years' period from 1892 to 1897, inclusive, rather than with the nine months ended September 30, 1898, which counsel for appellant insist are alone important. This for two reasons: *First:* It is a period affording a more comprehensive view and more just conclusions; *Second:* During eight of the nine months of 1898 in question, *it was to the interest of the appellant to swell its expense account to the largest proportions.* The act in question passed the House of Representatives February 2, 1898, and from that time appellant's effort was to show expense in excess of the rates. To aid its design it is shown that between the time the statement of employes' salaries was submitted to the committee of the House of Representatives in February and the approval of the act on July 1 following, the salaries of employes outside the operating force were increased more than $2,500. (Compare tables, Rec., pp. 72, 75). Mr. Crenshaw and Mr. Crandall each had an increase of $300. "Miscellaneous Employes' were increased $1,036.

For these reasons the tables for 1898 should be ignored.

It will be seen upon looking at the opinion of Mr. Justice Barnard, of the Supreme Court of the District of Columbia, who decided the case against complainants and dismissed the bill, that he not only accepted Mr. Bryan's inaccurate statement of revenues from the business at the rates fixed by the statute, but allowed as proper every item charged by Mr. Haskins to expense, including interest, sinking fund deposit, rentals and cost of construction (Rec., p. 125).

He also declared it improbable that even with lower rates the number of subscribers would be increased in the District of Columbia from the 2,126 then served (Rec., p. 125). Appellant's brief states that there are now 6,000 telephones in use here.

Testimony of Rates Elsewhere.

We have already set this out at large in our principal brief. That this testimony is not immaterial as declared by Judge Barnard, but is competent and of the highest value, has been decided by this court in *Cotting* v. *Kansas City Stock Yards Co., 183 U. S. 79.* In that case proof of rates at twelve other stock yards was received, and declared to be cogent evidence that similar rates charged by appellee were reasonable.

Without consideration of the tables of expense or criticism in detail of appellant's accounts, we submit that this proof, uncontradicted, that wherever competition in telephony has been had, rates have sunk to below the rates which may be earned under this act, requires that the decree below should be affirmed.

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Of Counsel.

No. 363.

Off. of Birney, Hemphill & Woodard
for Appellees

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Supplemental Brief for Appellees.

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As to the Finality of the Decree Appealed from.

We concede that the decree of the Court of Appeals was final and that the cause is properly here for decision on the merits.

The prayers of the bill of complaint are for process and an injunction only, no accounting being asked or necessary (Rec., p. 5). The temporary injunction allowed in the cause (Rec., pp. 15, 16), if made perpetual, would give complainants all the relief prayed or desired. This was precisely what the Court of Appeals ordered when it remanded the cause "for the entry of a decree granting the injunction in conformity with the opinion of this court" (Rec., p. 1182). We can not distinguish this decree from the judgment of the Supreme Court of California in question in *Mower* v. *Fletcher, 114 U. S. 127*, which ordered that the judgment of the State district court—

> "be reversed with costs, with directions to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

This court held that to be a final judgment because the litigation upon the merits was terminated, and nothing remained "to be done but to require the inferior court to perform the ministerial act of entering the judgments," nothing being left to its judicial discretion.

All these conditions are found in the case at bar.

Upon the signing of the decree ordered by the Court of Appeals the cause would be at an end, no further proceedings being proper or necessary. As was said in the case of *Mower* v. *Fletcher*, this distinguishes it from the many cases in this court where motions to dismiss have been successful. See, also—

Winthrop Iron Co. *vs.* Meeker, 109 U. S. 180.
Keystone, Etc., Co. *vs.* Martin, 132 U. S. 91.

We submit that jurisdiction is complete.

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